Supreme Court, U.S.
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No. 94-1544

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

LEONORA SANIDAD, JOSE GUILLO
and ALFREDO MAGLINAO,
Petitioners,

v.

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether persons born in possessions or territories of the United States (in this case the Philippine Islands during the period of time it was a possession of the United States) are citizens of the United States under the citizenship clause of the Fourteenth Amendment to the United States Constitution?

2. Whether the Constitution of the United States permits Congress to create different classes of nationality or citizenship - more specifically, is the Congressionally created status of "national but not a citizen" of the United States (which confers the obligations of nationality but not the benefits of citizenship) compatible with the concepts

and principles set forth in the Constitution?

LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

The following named individuals were parties to the proceedings in the courts below:

RODOLFO RABANG, REY RAMON RABANG, RONY RABANG, ELSA RABANG TAGALICUD, JOHNNY RABANG, JOSE TION GUILLO, LEONORA SANIDAD, ALFREDO MAGLINAO, JOSEPHINE YCARO, MICHAEL YCARO and JOHN YCARO.

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OPINIONS BELOW

The September 20, 1994 opinion of the Court of Appeals for the Ninth Circuit, whose judgment is herein sought to be reviewed, is reported at 35 F.3d 1449, and is reprinted in the separate Appendix to this Petition, pp. 31-68. The prior opinion of the United States District Court for the District of Hawaii, entered on June 5, 1991, is an unpublished decision, Case Nos. CV-90-00161-HMF, CV-90-00162-HMF, CV-90-00170-HMF, CV-90-

00176-HMF and CV-90-00154-HMF, and is reprinted in the separate Appendix to this Petition, pp. 72-77.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on September 20, 1994. A Petition for Rehearing was denied by the Court of Appeals on November 8, 1994. The jurisdiction of this Court is invoked pursuant to 28 USC § 1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, RULES AND REGULATIONS INVOLVED

This case directly involves the first section of the Fourteenth Amendment to the Constitution of the United States, which provides in pertinent part as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United and of

the State wherein they reside. . . ."

It also indirectly involves several other provisions of the Constitution of the United States and the overall intent of that document. The term "indirectly involves" is used because these provisions are significant in what they do not say rather than what they say. For example, nowhere in the Constitution do you find the phrase "national but not a citizen". Instead you find the words "citizen" or "people". And while the power to conduct foreign relations and other constiutional provisions obviously give Congress the power to make laws concerning immigration and Article 1, Section 8, Clause 4 of the Constitution gives Congress the power to establish a uniform rule of naturalization, nothing in the Constitution gives Congress or the Executive the power to create an inferior

class of beings who owe their allegiance to the United States and are subject to the complete control and dominion of the United States but do not even have the basic right to travel in the country of which they are a "national but not a citizen".

Also involved is the Treaty of Peace between the United States of America and the Kingdom of Spain, Dec. 10, 1898, U.S.-Spain, Art III, 30 Stat. 1754, 1755 (hereinafter "Treaty of Paris") by which the United States purchased the Philippine Islands from the Kingdom of Spain for Twenty Million Dollars. This treaty contains the following provision concerning the status of the inhabitants of the Philippine Islands:

> " The civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by the Congress." Treaty of Paris,

supra, art. IX, 30 Stat. at 1759.

The principal statutory provision involved is the Philippine Government Act, ch. 1369, 32 Stat. 691 (1902) which declared that inhabitants of the Philippine Islands as of April 11, 1899, and their children born subsequent thereto were deemed "citizens of the Philippine Islands and as such entitled to the protection of the United States. . . ." § 4, 32 Stat. at 692. It also provided that the Constitution and laws of the United States would not apply to the Philippines, §1, 32 Stat. at 692. The citizenship status of Filipinos remained unclear up to July 4, 1946 when the United States granted the Philippine Islands their independence and the Republic of the Philippines was established. Congress did, however, define the term "national"

in 1940. The current definition, which is similar to the 1940 Act, includes not only citizens but also "a person who, though not a citizen, owes permanent allegiance to the United States" 8 U.S.C. § 1101(a)(22). See also *Immigration Law and Procedure* by Gordon and Mailman, Vol. 4, § 91.01(3)(b) at 91-5.

STATEMENT OF THE CASE

This is an action for a declaratory judgment pursuant to the Declaratory Judgement Act, 28 U.S.C. § 2201, the Administrative Procedures Act, 5 U.S.C. § 701 et seq., 28 U.S.C. § 1361 and § 360 of the Immigration and Nationality Act, 8 U.S.C. § 1105a, brought by individuals born in the Philippines. Petitioners Guillo and Maglinao were born in the Philippines during the time it was a possession of the United States and each

claims that by virtue of his birth in a possession or territory of the United States he is a United States citizen under the clear language of the Fourteenth Amendment quoted above. Petitioner Sanidad was born in the Philippines after it received its independence from the United States but both of her parents were born in the Philippines during the time it was a possession of the United States. She claims citizenship under the provisions of 8 U.S.C. § 1401(c) which provides that a person born outside of the United States or its possessions is a United States citizen at birth if both of his/her parents were United States citizens at the time of his/her birth and one of the parents had resided in the United States or one of its outlying possessions prior to the child's birth.

The Evidence:

The evidence in this case is basically not in dispute and consists principally of the historical facts concerning the acquisition of citizenship by inhabitants of territories acquired by the United States since the Constitution was adopted and the historical facts concerning our purchase and subsequent control of the Philippines. The historical record, which was set forth in detail in the pleadings in the lower courts, clearly shows that until our purchase of the Philippines the inhabitants of territories acquired by the United States (with exceptions based on race) became citizens of the United States at the time of the acquistion of the territory or shortly thereafter. The historical record also establishes that the United States purchased the

Philippines with the purpose and intent to exercise full control and dominion over the Philippine Islands and the inhabitants thereof and that in fact we continued to do so until the Philippines was granted its independence on July 4, 1946.

The Rulings Below:

The United States District Court:

Judge Harold M. Fong of the United States District Court for the District of Hawaii granted the Respondent's Motion to Dismiss. In so doing he cited prior decisions holding that persons born in the Philippines between 1899 and 1946 are nationals but not citizens of the United States, specifically citing a Ninth Circuit Court of Appeals case, *Cabebe v. Acheson*, 183 F.2d 795 (9th Cir. 1950) and a Board of Immigration Appeals Case, *Matter of Hermosa*, 14 I&N Dec. 447 (BIA

1973). However in his decision Judge Fong briefly outlined the arguments raised by Petitioners and then stated:

> "While the issue presented by the plaintiffs in this action is an extremely interesting one, it is much more subject to appellate review and change at the Supreme Court level...." (At page 5).

Without clearly indicating whether he agreed or disagreed with the arguments advanced by Petitioners Judge Fong added:

> "This Court will not be the one to rewrite the law on the citizenship status of people born in the Philippines and their children." (At page 6).

Ninth Circuit Court of Appeals:

The Ninth Circuit Court of Appeals also decided the case in favor of the Respondents but in this case the decision was a split decision by a three-judge panel. In a comparatively short discussion the majority first conceded

that "No court has addressed whether persons born in a United States territory are born 'in the United States,' within the meaning of the Fourteenth Amendment." It is this issue which Petitioners are requesting this Honorable Court to resolve. The majority of the three-judge panel then cited prior decisions which have rejected claims that persons born in the Philippines during the territorial period retained their national status after the Philippines was granted independence or that Congress did not have the power to take away their "nationality", e.g., *Rabang v. Boyd*, 353 U.S. 427, 430-31 (1957), *Manguerra v. INS*, 390 F.2d 358, 360 (9th Cir. 1968). and *Cabebe v. Acheson*, 183 F.2d 795, 800 (9th Cir. 1950).

The majority then proceeded to address the question that had not been

ruled on previously and held that the Fourteenth Amendment's citizenship clause does not apply to persons born within U.S. territories "because those persons are not born 'in the United States' within the meaning of the Fourteenth Amendment." In so doing the majority relies entirely on the *Insular Cases*, which include *DeLima v. Bidwell*, 182 U.S. 1 (1901); *Dooley v. United States*, 182 U.S. 222 (1901); *Armstrong v. United States*, 182 U.S. 243 (1901); and *Downes v. Bidwell*, 182 U.S. 244 (1901). Without addressing several of the issues raised by Petitioners (including the obviously racist factors that influenced the Supreme Court in making its decisions back in 1901) the majority concluded that their decision was compelled by Supreme Court precedent.

In a considerably longer and very strong and well written dissent Judge

Harry Pregerson traced the relationship between the term "subject" under the English common law and "citizen" under the U.S. Constitution. Quoting frequently from the exhaustive discussion of citizenship in this Court's decision in *United States v. Wong Kim Ark*, 169 U.S. 649 (1898) as well as other cases such as *Inglis v. Sailors' Snug Harbor*, 3 Pet. 99 (1830), Judge Pregerson clearly demonstrated that for the purposes of the citizenship clause of the Fourteenth Amendment the term "United States" definitely included the territories of the United States. Judge Pregerson also precisely shows why the *Insular Cases* cited by the majority do not decide the issues in question and in part support the position of the Petitioners since even those cases concede that fundamental constitutional rights do apply to

inhabitants of "unincorporated territories" and what could be more fundamental than the basic right to citizenship? Judge Pregerson concluded his dissent in the following clear and unequivocal language:

> "...Persons born in the Philippines during the territorial period indisputably were born within the dominion of the United States, and therefore were born 'in the United States' within the meaning of the Citizenship Clause. Moreover, neither congressional power to control naturalization and regulate territories, nor the now disfavored doctrine of territorial incorporation, authorizes this Court to deny to these Plaintiffs what the people of this country sought to ensure under the Fourteenth Amendment--the inviolability of the fundamental right to citizenship by birth."

REASONS FOR GRANTING THE WRIT

The Court should grant the writ in this case for two reasons: First, the

Petitioners Guillo and Maglinao have been unconstitutionally deprived of the basic right to live and work in the country of their birth - the United States of America. Petitioner Sanidad who acquired United States citizenship through her birth to citizen parents has also been denied this fundamental right. The situation is essentially no different than, for example, for the Immigration and Naturalization Service to say that an individual born in Hawaii or Alaska while they were territories had no right to enter or reside in the contiguous 48 states. Second, the case involves basic constitutional questions which presently effect and will continue to effect not only the Petitioners in this case but also many others. Both the majority opinion and the dissent stressed that there is no specific prior decision on the issues

raised in this case. Moreover, a decision in this matter will determine not only the citizenship of present generation of American "nationals but not citizens" but also the citizenship and rights of the inhabitants of possible future territorial acquisitions of the United States. While no territorial acquisition is currently in progress it is quite conceivable that in the future the United States will decide to acquire additional territory, be it large or small. An obvious factor in determining whether or not to make such an acquisition is the citizenship status of the inhabitants of the territories to be acquired. In addition, even today persons born in American Samoa are considered to be "nationals but not citizens" of the United States since American Samoa is considered to be an "unincorporated possession" of the United States. Whether

or not the decision of the Court is for or against the Petitioners in this case the legality of such status needs to be finally determined.

As indicated the case involves a number of important constitutional issues. A concise statement of each of the issues raised follows:

I

The Circuit Court of Appeals Was Wrong In Its Conclusion Since It Is Not In Accord With Historical Reality.

The majority opinion of the Circuit Court states that it is incorrect to extend citizenship to persons living in United States territories because those persons are not born in the United States within the meaning of the Fourteenth Amendment, citing in support of this conclusion statements such as "'the term "United States" as used in the

Constitution, has reference only to the States that constitute the Federal Union and does not include the Territories.'" This is simply wrong as a matter of historical fact. For example, in 1803 the United States purchased the Louisiana Territory from France (the largest single acquisition of territory in our history). Upon the conclusion of the treaty between the United States and France the inhabitants of the territory became United States citizens (unless they chose to retain their French citizenship and return to France).

II.

The Court of Appeals Wrongly Assumed That The Constitution Provides For or In Some Way Authorizes a Status Known As "National But Not a Citizen of the United States".

The majority decision makes several references to a "national but not a

citizen of the United States" and in one footnote makes references to definitions of the term "national". However at no point in its decision does the majority discuss the origin of such a status or the authority for the creation of this inferior level of nationality. It is submitted that in fact there is no constitutional authority for such a status nor is there any constitutional authority for the legislative or executive branch to create such a status. It is further submitted that, if anything, the Constitution (in particular the Thirteenth, Fourteenth and Fifteenth Amendments) in its quest for equality among all men mandates against the creation in the United States of any type of political or civil status in which persons due to their race or place of

origin have lesser rights and privileges than others.

III.

The Court of Appeals Wrongfully Assumed That The Term "civil rights and political status" Used in the Treaty of Paris Is Equivalent to Citizenship.

The majority opinion accepts, without any discussion, the proposition that the provision in the Treaty of Paris stating that the "civil rights and political status" of persons born in the Philippines shall be determined by Congress means that Congress shall and may determine the citizenship of such individuals. It is submitted that the term "civil rights and political status" is not equivalent to either "citizenship" or "nationality" and that even assuming Congress has the inherent power to create a lesser status of nationality the Treaty of Paris did not

provide for Congress to create such a status for inhabitants of the Philippines.

IV

The Court of Appeals Erred in Not Recognizing Citizenship as a Fundamental Right that Applies Throughout the Dominion of the United States.

The majority opinion relied upon the *Insular Cases* as the basis for their decision. However, as pointed out in the dissenting opinion, even the *Insular Cases* and their progeny (including *Dorr v. United States*, 195 U.S. 138 (1904)) recognize that fundamental constitutional rights apply throughout the dominion of the United States. Certainly it would appear that citizenship is such a fundamental constitutional right and even if the *Insular Cases* are held to still be valid a determination should have been made by the court as to whether or not

citizenship is a fundamental constitutional right.

IV

The Court of Appeals Erred in Not Considering the Racial Factors that Motivated the Prior Decisions in the *INSULAR CASES*.

There is no question but that the *Insular Cases* were decided at a time in our history when racism and racial discrimination were an ever present factor in American life. The language used in *Downes v. Bidwell*, supra, and other cases clearly indicates that judges who wrote the decisions had a racial bias entering into their decisions. The racial aspect of these decisions was raised by the petitioners before the Court of Appeals but the Court did not address this aspect of the case. In following the *Insular Cases* without addressing the racial aspects of those decisions and determining

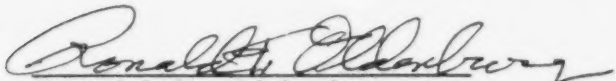
if those decisions can be upheld absent such racial bias the Court is not only perpetuating racial stereotypes and fears, it is also endorsing continued de facto discrimination by the federal government based on race and/or place of origin..

CONCLUSION

In his extensive discussion of the issues and the historical development of citizenship under the Constitution Judge Pregerson in his dissent ably and correctly set forth not only the legal issues raised by the Petitioners but also the reasons why certiorari should be granted in this case. His analysis of the case and the issues presents the case of the Petitioners far better than can be done in this petition. Based on this dissent and the factors mentioned above the petitioners respectfully pray that

their petition for a writ of certiorari be granted.

Respectfully submitted,



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Dated: February 3, 1995.

APPENDIX

A.
JUDGMENT OF COURT OF APPEALS

B.

DENIAL OF PETITION FOR REHEARING
BY COURT OF APPEALS

C.

DECISION OF UNITED STATES DISTRICT COURT

D.
TREATY OF PEACE BETWEEN THE UNITED STATES
OF AMERICA AND THE KINGDOM OF SPAIN,

signed Dec. 10, 1898.

APPENDIX A

JUDGMENT OF THE
NINTH CIRCUIT COURT OF APPEALS

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RODOLFO RABANG; JOSE TION GUILLO; LEONORA VER SANIDAD; ALFREDO MAGLINAO; JOSEPHINE YCARO; MICHAEL YCARO; JOHN YCARO,

Plaintiffs-Appellants,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Defendant-Appellee.

No. 91-16125

D.C. Nos.
CV 90-00154 HMF
90-00161 HMF
90-00162 HMF
90-00170 HMF
90-00176 HMF

OPINION

Appeal from the United States District Court
for the District of Hawaii
Harold M. Fong, District Judge, Presiding

Argued and Submitted
October 8, 1992—San Francisco, California

Filed September 20, 1994

Before: Thomas Tang, Harry Pregerson, and
Arthur L. Alarcon, Circuit Judges.

Opinion by Judge Tang; Dissent by Judge Pregerson

SUMMARY

Immigration/Citizenship

The court of appeals affirmed a district court judgment. The court held that persons born in the Philippines during the

period when it was a territory of the United States were not born "in the United States" within the meaning of the Citizenship Clause, and are thus not entitled to United States citizenship by birth.

Appellants Rodolfo Rabang and six other individuals, all of whom were at some stage of deportation proceedings brought against them by appellee the Immigration and Naturalization Service (INS), sought a declaratory judgment that they were entitled to citizenship under the Citizenship Clause of the Fourteenth Amendment. The plaintiffs alleged that they or their parents were born in the Philippines during the period when the Philippines was a United States territory, that during this time the Philippine Islands were "in the United States," and that they were subject to the jurisdiction of the United States at their birth. They therefore claimed that they (or their parents) were born "in the United States" and thus constitutionally entitled to citizenship. The district court granted the government's motion to dismiss for failure to state a claim for relief. The plaintiffs appealed.

[1] The Citizenship Clause provides that all persons born "in the United States" are citizens of the United States. [2] Birth in the Philippines during the territorial period does not constitute birth "in the United States" under the Citizenship Clause, and thus does not give rise to United States citizenship.

[3] The Supreme Court previously decided that the territorial scope of the phrase "the United States" as used in the Constitution is limited to the states of the Union. [4] The Citizenship Clause has an express territorial limitation which prevents its extension to every place over which the government exercises its sovereignty. [5] It is incorrect to extend citizenship to persons living in United States territories simply because the territories are "subject to the jurisdiction" or "within the dominion" of the United States, because those

persons are not born "in the United States" within the meaning of the Fourteenth Amendment.

Circuit Judge Pregerson dissented, stating that persons born in the Philippines during the territorial period should be considered United States citizens within the meaning of the Fourteenth Amendment's Citizenship Clause. Persons born in the Philippines during the territorial period indisputably were born within the dominion of the United States.

COUNSEL

Ronald T. Oldenberg, Honolulu, Hawaii, for the plaintiffs-appellants.

Lisa Dornell, Office of Immigration Litigation, United States Department of Justice, Washington, D.C., for the defendant-appellee.

OPINION

TANG, Senior Circuit Judge:

Rodolfo Rabang and six other individuals appeal from the district court's dismissal of their complaints for failure to state a claim for relief. The complaints allege that plaintiffs or their parents were born in the Philippine Islands when those islands were United States territory, and seek declaratory judgments that plaintiffs are United States citizens under the Citizenship Clause of the Fourteenth Amendment, or under the Citizenship Clause in conjunction with § 301 of the Immigration and Nationality Act, 8 U.S.C. § 1401 (citizenship by descent). We have jurisdiction under 28 U.S.C. § 1291 and affirm.

BACKGROUND

At the close of the Spanish-American War on December 10, 1898, Spain ceded the Philippine Islands to the United States by treaty. *See* Treaty of Peace between the United States of America and the Kingdom of Spain, Dec. 10, 1898, U.S.-Spain, art. III, 30 Stat. 1754, 1755 (hereafter "Treaty of Paris").[1] That treaty provided that "[t]he civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by the Congress." Treaty of Paris, *supra*, art. IX, 30 Stat. at 1759.

The United States maintained military rule over the Philippine Islands until 1902. 2 R. Hofstadter, W. Miller & D. Aaron, *The American Republic* 340 (1959). Congress then enacted the Philippine Government Act, which established the terms of United States' civilian rule over the Philippines. *See* ch. 1369, 32 Stat. 691 (1902). That enactment provided that certain inhabitants of the Philippine Islands as of April 11, 1899 and "their children born subsequent thereto" were deemed "citizens of the Philippine Islands and as such entitled to the protection of the United States . . . ." § 4, 32 Stat. at 692. It also provided that the Constitution and laws of the United States would not apply to the Philippines.[2] § 1, 32 Stat. at 692.

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[1]By the same treaty, Spain also ceded to the United States the islands of Puerto Rico and Guam, and relinquished its sovereignty over Cuba. *See* Treaty of Paris, *supra*, arts. I, II, 30 Stat. at 1755.

The inhabitants of Puerto Rico and Guam have been granted United States citizenship by statute. *See* Organic Act of Puerto Rico, ch. 145, § 5, 39 Stat. 951, 953 (1917) (conferring United States citizenship on some Puerto Rican citizens); Nationality Act of 1940, ch. 876, § 202, 54 Stat. 1137, 1139 (1940) (conferring citizenship on all those born in Puerto Rico after 1899); Organic Act of Guam, ch. 512, § 4(a), 64 Stat. 384, 384 (1950) (conferring United States citizenship on Guamanians). The United States never exercised sovereignty over Cuba, declaring instead that control over Cuba should be left "to its people." *See* H.R.J. Res. 24, § 4, 55th Cong., 2d Sess., 30 Stat. 738 (1898).

[2]The Philippine Government Act declared that "[t]he provisions of section [1891] of the Revised Statutes of [1878] shall not apply to the Philip-

In 1916, Congress adopted the Philippine Autonomy Act to "declare the purpose of the people of the United States as to the future political status of the people of the Philippine Islands, and to provide a more autonomous government for those islands." Philippine Autonomy Act, ch. 416, 39 Stat. 545 (1916). That act reiterated that "all inhabitants of the Philippine Islands who were Spanish subjects on [April 11, 1899] . . . and their children born subsequent thereto, shall be deemed . . . citizens of the Philippine Islands." § 2, 39 Stat. at 546.

Finally, thirty-five years after the United States acquired the Philippine Islands, Congress adopted the Philippine Independence Act. *See* Philippine Independence Act, ch. 84, 48 Stat. 456 (1934). That act provided for the adoption of "a constitution for the government of the Commonwealth of the Philippine Islands," § 1, 48 Stat. at 456, and for the complete withdrawal of United States sovereignty ten years after the adoption of a Philippine constitution. § 10(a), 48 Stat. at 463 (codified at 22 U.S.C. § 1394(a) (1990)). The act also declared that citizens of the Philippine Islands who were not also citizens of the United States were to be considered "aliens" under the immigration laws of the United States. § 8(a)(1), 48 Stat. at 462.

On July 4, 1946, the United States relinquished control over the Philippine Islands and declared them to be an independent sovereign, thus ending their status as a United States

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pine Islands." § 1, 32 Stat. at 692. Section 1891 of the Revised Statutes of 1878, in turn, provided that:

> The Constitution and all laws of the United States which are not locally inapplicable shall have the same force and effect within all the organized Territories, and in every Territory hereafter organized as elsewhere within the United States.

Rev. Stat. of 1878, ch. 1, § 1891, 18 Stat. 325, 333 (1874).

territory. *See* Proclamation No. 2695, 60 Stat. 1352, 11 Fed. Reg. 7517 (1946), *reprinted in* 22 U.S.C. § 1394 (1990).

DISCUSSION

I.

The government argued to the district court that the plaintiffs had failed to exhaust their administrative remedies. Although the government does not raise this issue on appeal, we must *sua sponte* consider whether there is subject matter jurisdiction over this appeal. *See McGuckin v. Smith*, 974 F.2d 1050, 1052 (9th Cir. 1992). Because the Board of Immigration Appeals has no jurisdiction to adjudicate constitutional issues, the plaintiffs' failure to raise their challenge at the administrative level does not deprive this court of jurisdiction. *See Hernandez-Rivera v. INS*, 630 F.2d 1352, 1355-56 (9th Cir. 1980).

II.

The district court consolidated these cases, and the government moved to dismiss them under Fed. R. Civ. P. 12(b)(6). The district court granted the government's motion to dismiss.

A dismissal for failure to state a claim under Fed. R. Civ. P. 12(b)(6) is a ruling on a question of law and is reviewed *de novo*. *Buckey v. County of Los Angeles*, 968 F.2d 791, 793-94 (9th Cir.), *cert. denied*, 113 S. Ct. 599, 600 (1992). A complaint should not be dismissed unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Id.* The decision of the district court may be affirmed on any ground supported in the record. *Oscar v. University Students Co-operative Ass'n*, 965 F.2d 783, 785 (9th Cir.) (en banc), *cert. denied*, 113 S. Ct. 655, 656 (1992).

III.

All plaintiffs in this case are at some stage of deportation proceedings brought against them by the Immigration and Naturalization Service. Each complaint seeks declaratory judgment that the plaintiffs are entitled to citizenship under the Citizenship Clause of the Fourteenth Amendment. The plaintiffs allege that they or their parents were born in the Philippines during the territorial period, that during this time the Philippine Islands were "in the United States," and that plaintiffs were subject to the jurisdiction of the United States at their birth. They therefore claim that they (or their parents) were born "in the United States" and thus constitutionally entitled to citizenship.[3]

[1] The Citizenship Clause of the Fourteenth Amendment provides that:

> All persons *born* or naturalized *in the United States* and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.

U.S. Const. amend. XIV (emphasis added).

No court has addressed whether persons born in a United States territory are born "in the United States," within the meaning of the Fourteenth Amendment.[4] The courts have,

[3]With respect to those who assert that their parents were born in the Philippines during the territorial period, the complaints also allege that these plaintiffs meet the applicable statutory requirements for acquisition of United States citizenship by descent. *See* 8 U.S.C. § 1401 (Supp. 1993). Because the district court's dismissal was based solely on the conclusion that birth in the territorial Philippines does not confer United States citizenship, this appeal does not concern any other issues related to citizenship by descent. *See* § 1401(c)-(g) (Supp. 1993) (listing the various conditions for citizenship by descent).

[4]This claim has been raised, but not addressed by the courts. *See, e.g., Resurreccion-Talavera v. Barber*, 231 F.2d 524, 525 (9th Cir. 1956); *Gancy v. United States*, 149 F.2d 788, 789 (8th Cir.), *cert. denied*, 326 U.S. 767 (1945).

however, uniformly rejected claims that people born in the Philippines during the territorial period retained their "national" status[5] after Philippine independence. *See, e.g., Rabang v. Boyd*, 353 U.S. 427, 430-31 (1957) (rejecting claim that status as a United States "national" was so related to "citizenship" that U.S. relinquishment of the Philippine Islands could not divest petitioner of his U.S. nationality); *Manguerra v. INS*, 390 F.2d 358, 360 (9th Cir. 1968) (rejecting argument that United States nationality could not be taken away without consent); *Cabebe v. Acheson*, 183 F.2d 795, 800 (9th Cir. 1950) (rejecting claim that Congress did not have power to divest petitioner of nationality).

[2] We now hold that birth in the Philippines during the territorial period does not constitute birth "in the United States" under the Citizenship Clause of the Fourteenth Amendment, and thus does not give rise to United States citizenship.

[3] In the *Insular Cases*[6] the Supreme Court decided that the territorial scope of the phrase "the United States" as used in the Constitution is limited to the states of the Union. Those cases addressed challenges to the imposition of duties on

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[5]The term "national" came into popular use in this country when the United States acquired territories outside its continental limits, and was used in reference to noncitizen inhabitants of those territories. 4 Charles Gordon and Stanley Mailman, *Immigration Law and Procedure*, § 91.01[3][b], at 91-5 (1993). Nonetheless, Congress did not define that term until 1940. *See* Nationality Act of 1940, *supra* note 1, §§ 101(a), 204, 54 Stat. at 1137, 1139; 4 C. Gordon and S. Mailman, *supra*, § 91.01[3][b], at 91-5. The current definition of the term "national" was adopted in the Immigration and Nationality Act of 1952, ch. 477, § 101(a)(22), 66 Stat. 163, 169 (1952), and is codified at 8 U.S.C. § 1101(a)(22) (1990) (a "national" is a citizen of the United States and a person who, though not a citizen, owes permanent allegiance to the United States).

[6]*De Lima v. Bidwell*, 182 U.S. 1 (1901); *Dooley v. United States*, 182 U.S. 222 (1901); *Armstrong v. United States*, 182 U.S. 243 (1901); and *Downes v. Bidwell*, 182 U.S. 244 (1901). The holdings of the *Insular Cases* were recently reaffirmed by the Supreme Court and remain valid law. *See United States v. Verdugo-Urquidez*, 494 U.S. 259, 268-69 (1990).

goods shipped from Puerto Rico to the continental United States. The Court held that Puerto Rico was "not a part of the United States within the revenue clauses of the Constitution." *Downes v. Bidwell*, 182 U.S. 244, 287 (1901). *See* U.S. Const. art I, § 8 ("all duties, imposts, and excises shall be uniform *throughout the United States*") (emphasis added).[7]

[4] In arriving at this conclusion, the Court compared the language of the revenue clause ("all duties . . . shall be uniform throughout the United States") with that of the Thirteenth Amendment (prohibiting slavery "within the United States, *or* in any place subject to their jurisdiction") and the Fourteenth Amendment (extending citizenship to those born "in the United States, *and* subject to the jurisdiction thereof"). *Id.* at 251 (emphasis added). The Court emphasized that the language of the Thirteenth Amendment demonstrates that "there may be places within the jurisdiction of the United States that are no part of the Union." *Id.* In comparison, the Fourteenth Amendment has "a limitation to persons born or naturalized in the United States *which is not extended to persons born in any place 'subject to their jurisdiction.'* " *Id.* (emphasis added). Like the revenue clauses, the Citizenship Clause has an express territorial limitation which prevents its extension to every place over which the government exercises its sovereignty. *Cf. United States v. Verdugo-Urquidez*, 494 U.S. 259, 291 n. 11 (1990) (Brennan, dissenting) (distinguishing *Downes* holding regarding the revenue clauses, because the Fourth Amendment "contains no express territorial limitations").

The *Downes* Court further stated: "[I]n dealing with foreign sovereignties, the term 'United States' has a broader meaning than when used in the Constitution, and includes all territories

[7]Regarding application of other constitutional provisions to Puerto Rico and the Philippines, *see also, Balzac v. Porto Rico*, 258 U.S. 298 (1922); *Ocampo v. United States*, 234 U.S. 91 (1914); *Dorr v. United States*, 195 U.S. 138 (1904); and *Hawaii v. Mankichi*, 190 U.S. 197 (1903).

subject to the jurisdiction of the Federal government, wherever located." *Downes*, 182 U.S. at 263. In other words, as used in the Constitution, the term "United States" does not include all territories subject to the jurisdiction of the United States government. *See also Examining Board of Engineers, Architects and Surveyors v. Flores de Otero*, 426 U.S. 572, 588 n. 19 (1976), *citing* H.R. Rep. No. 249, 56th Cong., 1st Sess., 16 (1900) ("upon reason and authority the term 'United States' as used in the Constitution, has reference only to the States that constitute the Federal Union and does not include the Territories.")

[5] It is thus incorrect to extend citizenship to persons living in United States territories simply because the territories are "subject to the jurisdiction" or "within the dominion" of the United States, because those persons are not born "in the United States" within the meaning of the Fourteenth Amendment.[8]

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[8]We note that the territorial scope of the phrase "the United States" is a distinct inquiry from whether a constitutional provision should extend to a territory, *see Downes*, 182 U.S. at 249, and we rely on the *Insular Cases* only to determine the meaning of the phrase "in the United States." While we are mindful of plaintiffs' claims that the district court erroneously excluded expert evidence regarding the history of the acquisition of the Philippine Islands and the racist sentiments that motivated the United States' treatment of the Philippines and the *Insular Cases*, we affirm the district court's dismissal on an issue of law only.

Because we conclude that birth in the Philippines does not give rise to citizenship under the Fourteenth Amendment, we need not decide whether citizenship is a "fundamental right" which would extend of its own force to a territory under the "territorial incorporation" doctrine.

We hasten to add that if the plaintiffs were entitled to citizenship under the Fourteenth Amendment, this would not conflict with Congress' constitutional power to regulate naturalization, as urged by the government. The power to confer citizenship through naturalization does not confer the power to take citizenship away. *See Wong Kim Ark*, 169 U.S. at 703 (Congress has no authority to restrict the effect of citizenship by birth); *Afroyim v. Rusk*, 387 U.S. 253, 257 (1967) (same).

IV.

The dissent relies on dicta in two Supreme Court cases to conclude that birth in a United States territory constitutes birth "in the United States" under the Fourteenth Amendment. In *United States v. Wong Kim Ark*, 169 U.S. 649 (1898), the Supreme Court held that a person born in San Francisco, California, of Chinese parents, could not be excluded from the United States under the Chinese Exclusion Acts after a temporary visit to China. The Supreme Court held that the Citizenship Clause confers citizenship "by birth within the territory." *Id.* at 693. In *Inglis v. Sailors' Snug Harbor*, 3 Pet. 99, 155 (1830), Mr. Justice Story in his concurring and dissenting opinion to the majority opinion explained that citizenship by birth arises by "birth locally within the dominions of the sovereign; and . . . birth within the protection and obedience . . . of the sovereign."

Focusing upon the phrases "within the territory" and "within the dominions," the dissent concludes that persons born in territories of the United States are born "in the United States." As previously discussed, the Supreme Court has already interpreted the territorial scope of the phrase "the United States" as used in the Constitution as limited to the states of the Union. Moreover, the dissent elevates the significance of this dicta in these cases.

There is no indication that the Court in *Wong Kim Ark* and *Inglis* would have used such broad language had it been faced with the facts of the case before us. *Wong Kim Ark* involved a person born in San Francisco, California. The fact that he had been born "within the territory" of the United States was undisputed, and made it unnecessary to define "territory" rigorously or decide whether "territory" in its broader sense (i.e. outlying land subject to the jurisdiction of this country) meant "in the United States" under the Citizenship Clause. The outcome in *Inglis* also did not depend on the meaning of "in the United States." Decided *prior* to the enactment of the Four-

teenth Amendment, that case addressed whether a person born in the colonies prior to the Declaration of Independence, whose parents remained loyal to England and left the colonies after independence, was a citizen and thus capable of inheriting land in the United States. It was simply unnecessary to address the territorial scope of citizenship under common law.

A focus on these select phrases is also misleading in view of the ambiguous ways in which the Court at other places defines the territorial scope of citizenship. *See Wong Kim Ark*, 169 U.S. at 658 (under the English common law rule, "every child born *in England* of alien parents was a natural-born subject") (emphasis added)[6]; *id.* at 661 ("[p]ersons who are born *in a country* are generally deemed citizens and subjects of that country") (emphasis added; citation omitted); *id.* at 665 ("[t]he right of citizenship . . . is incident to birth *in the country*") (emphasis added; citation omitted). *But see, id.* at 666 ("mere birth *within the realm* gives the rights of a native-born citizen") (emphasis added; citation omitted); *id.* at 667 (discussing the "ancient rule of citizenship by birth *within the dominion*") (emphasis added); *id.* at 674 ("the fundamental rule of citizenship by birth *within its sovereignty*") (emphasis added); *id.* at 675, 688 (reaffirmation by the Fourteenth Amendment of citizenship by birth "*within the dominion*") (emphasis added).

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[6]Wholesale importation of British common law on "subject" status to interpret the meaning of the Citizenship Clause is inadvisable because of possible differences between "subjects" and "citizens." The Supreme Court has given inconsistent pronouncements on whether the concept of "subject" and "citizen" are the same. *See Wong Kim Ark*, 169 U.S. at 656 ("subject" or "political status" may be quite different from "citizenship" or "civil status"); *Chisholm v. Georgia*, 2 Dall. 419, 455 (1793) ("Under [the] constitution, there are *citizens*, but no *subjects*."). *But see Wong Kim Ark*, 169 U.S. at 664 ("The term 'citizen' . . . is precisely analogous to the term 'subject' in the common law, and the change of phrase has entirely resulted from the change of government."), and *id.* at 665 ("Subject and citizen are, in a degree, convertible terms *as applied to natives*.") (emphasis added; citation omitted).

A selective focus on language supporting a broad interpretation of the Citizenship Clause is an unjustified reliance on dicta. The Court in *Wong Kim Ark* cautioned against the use of dicta in determining the meaning of "subject to its jurisdiction" in the Fourteenth Amendment: "general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision." 169 U.S. at 679. Neither *Wong Kim Ark* nor *Inglis* decided the meaning of "in the United States" in the Fourteenth Amendment.

CONCLUSION

The Philippine Islands are now a sovereign nation. Supreme Court precedent compels a conclusion that persons born in the Philippines during the territorial period were not "born . . . in the United States," within the meaning of the Citizenship Clause of the Fourteenth Amendment, and are thus not entitled to citizenship by birth.

AFFIRMED.

PREGERSON, Circuit Judge, dissenting:

In determining that the Fourteenth Amendment Citizenship Clause requires that a person be born in the states of the Union, the majority opinion incorrectly relies on very limited language from the Revenue Clause of Article I, Section 8 of the Constitution and on just one of the *Insular Cases*. This narrow approach overlooks principles of common law, readily accepted by the framers of the Constitution and the authors of the Fourteenth Amendment, which demonstrate that the Citizenship Clause applies to all persons who owe allegiance to,

and are born within the territory or dominion of, the United States.

The majority opinion looks for support to only one of the *Insular Cases*, i.e., *Downes v. Bidwell*, 182 U.S. 244 (1901). *Downes*, which extensively discusses the history and meaning of the Revenue Clause, does not purport to interpret the Citizenship Clause, or any other provision of the Constitution. And, the majority opinion acknowledges in footnote 8 that the issue of territorial scope of the phrase "in the United States" as found in the Citizenship Clause is not an issue in *Downes*, which was concerned solely with whether the Revenue Clause applied to the territory of Puerto Rico.

Further, the Revenue Clause, on which the majority opinion heavily relies, states:

> The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States.

The history, meaning, function, and subject matter of the Revenue Clause clearly differ from those of the Citizenship Clause. In short, neither *Downes* nor the Revenue Clause has anything to do with the citizenship status of a person born in a United States territory.

But more importantly, the history of the Fourteenth Amendment and its jurisprudence demonstrate unequivocally that the framers intended the term "in the United States" to refer to all persons born within United States' territory. Far from providing "ambiguous" dicta as the majority opinion suggests, the Supreme Court's exhaustive opinion in *United States v. Wong Kim Ark*, 169 U.S. 649 (1898), makes clear that the Fourteenth Amendment was intended to codify exist-

ing common law on the subject of United States citizenship. In addition, *Wong Kim Ark* cites numerous common law sources and authorities which indicate that all persons born within the *territory* of a sovereign nation and who owe complete allegiance to that nation are deemed "natural born" for purposes of citizenship. Thus, I would hold that persons born in the Philippines during the territorial period—between December 10, 1898 and July 4, 1946—should be considered United States citizens within the meaning of the Fourteenth Amendment's Citizenship Clause.

DISCUSSION

As the majority opinion notes, since 1946 persons born in the Philippines during the territorial period have unsuccessfully advanced various theories to establish that they were not "aliens" with respect to the United States. Many of these plaintiffs (as well as the courts) assumed that persons born in the Philippines during the territorial period acquired status only as United States "nationals" at birth. *See, e.g., Rabang v. Boyd*, 353 U.S. 427, 430 (1957); *Manguerra v. INS*, 390 F.2d 358, 360 (9th Cir. 1968); *Cabebe v. Acheson*, 183 F.2d 795, 800 (9th Cir. 1950); *Gancy v. United States*, 149 F.2d 788, 789 (8th Cir.), *cert. denied*, 326 U.S. 767 (1945). What is significant about these earlier cases is that the courts, without considering the Citizenship Clause, *assumed* that the United States was free to grant or withhold citizenship to the people of the Philippines while the Islands were under the complete dominion and control of the United States.[1]

In the case before us, however, Plaintiffs seek declaratory and injunctive relief under a *new* theory which directly chal-

[1]Although Congress may grant citizenship, it is indisputable that it does *not* have the power to take it away. *See Afroyim v. Rusk*, 387 U.S. 253, 257 (1967) (the Constitution grants the government "no power, even under its express power to pass a uniform rule of naturalization," to revoke United States citizenship).

lenges the constitutional validity of this earlier assumption.[2] Plaintiffs contend that by virtue of their birth, or their parents' birth, in the Philippines during the territorial period, they qualify as United States citizens under the Citizenship Clause of the Fourteenth Amendment. The District Court dismissed Plaintiffs' cases without analyzing this new claim of citizenship based on the Fourteenth Amendment. Instead, the District Court observed that the earlier cases were unanimous in their view that persons born in the Philippines during the territorial period were United States nationals, not citizens, and refused to "rewrite the law" regarding the status of persons born in the Philippines.

But a careful examination of the history underlying the passage of the Fourteenth Amendment and the common law underlying our Constitution leads me to conclude that the Dis-

[2]We found only two published decisions in which this issue was raised. In a case before this Court, a plaintiff claimed citizenship under the Fourteenth Amendment based on his birth "in the Philippine Islands at a time when the United States exercised sovereignty over those possessions." *See Resurreccion-Talavera v. Barber*, 231 F.2d 524, 525 (9th Cir. 1956). We did not, however, address this claim. Rather, after stating plaintiff's contention, we merely declared that plaintiff's birth in the Philippines in 1934 accorded him the status of a "non-citizen national." *Id.* In so doing, we relied on two earlier decisions by this court concerning a related, but distinct issue, and did not address the Fourteenth Amendment claim. *Id.* Because the court in *Resurreccion-Talavera* ignored the plaintiff's Fourteenth Amendment claim, that decision has no precedential effect on this issue.

In an unrelated administrative proceeding, the Board of Immigration Appeals did address this very issue. *See Matter of Hermosa*, 14 I. & N. Dec. 447 (1973). In that case, plaintiff argued that, under the Fourteenth Amendment, she acquired United States citizenship by birth in the Philippines in 1943. In rejecting Hermosa's argument, the Board relied on the *statutory* definition of the term "the United States" adopted as part of the Nationality Act of 1940, *see* § 101(d), 54 Stat. at 1137. The Board reasoned that because the Philippines were not among the geographic areas listed in that statutory definition, Hermosa was not born "in the United States" within the meaning of the Fourteenth Amendment. 14 I. & N. Dec. at 448-49.

trict Court and the majority opinion wrongly decided Plaintiffs' citizenship claim. I submit that persons living in the Philippine Islands who owed complete allegiance to, and were under the complete dominion and control of, the United States during the territorial period are constitutionally entitled to citizenship under the Fourteenth Amendment.

The first sentence of the Fourteenth Amendment, Section 1 (the "Citizenship Clause") provides that:

> All persons *born* or naturalized *in the United States*, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.

U.S. Const. amend. XIV (emphasis added). The critical issue presented in this case is whether persons born in the Philippine Islands during the period those islands were United States territory were "born . . . in the United States" within the meaning of the Fourteenth Amendment.[3]

I agree with the majority opinion that, to determine whether Plaintiffs' complaints state a claim for relief, we must first define the term "in the United States" as used in the Citizenship Clause. In defining that term, the majority opinion incorrectly relies on the Revenue Clause and on limited language in *Downes* to conclude that the Fourteenth Amendment applies only to the states of the Union. Such a conclusion ignores a large body of common law summarized in *Wong Kim Ark* which indicates that the Citizenship Clause confers citizenship by birth within the territory of the sovereign nation. Additionally, assuming that the reasoning in *Downes* applies, I would still dissent because I believe that the right to citizenship by birth is among those fundamental constitu-

[3]Neither the Government nor the majority opinion contends that Plaintiffs were not "subject to the jurisdiction" of the United States at their birth, within the meaning of the Citizenship Clause.

tional rights which must apply by their own force even under *Downes*.

A. Meaning of the Citizenship Clause

As the majority opinion notes, the words of the Fourteenth Amendment do not define on their face the meaning of the phrase "in the United States" to determine the right to citizenship by birth. Therefore, that scope should not be determined without recourse to the history and purposes of the Fourteenth Amendment. Based on the Revenue Clause and dicta from *Downes*, the majority opinion expresses the view that Congress may deny citizenship to persons born in the United States' territories because birth outside of the states of the Union is not covered under the Fourteenth Amendment. This view does not square with the intentions of the authors of the Fourteenth Amendment, nor with the plain language of the cases that have actually addressed the Citizenship Clause.

United States v. Wong Kim Ark, decided by the United States Supreme Court nearly a century ago, discusses at length the importance and status of the common law rule of citizenship by birth in determining the meaning of the Citizenship Clause. Thus, *Wong Kim Ark* must guide our determination of whether the Citizenship Clause confers United States citizenship on persons born in the Philippine Islands during the territorial period. In *Wong Kim Ark*, the Court held that a person born in the United States, of parents born in China, could not be excluded from the United States under the Chinese Exclusion Acts. In reaching its decision, the Court exhaustively examined the meaning and scope of the Citizenship Clause. At the outset, the Court discussed the importance of the common law in interpreting the Fourteenth Amendment.

> The constitution nowhere defines the meaning of these words [of the Fourteenth Amendment], either by way of inclusion or of exclusion . . . . [I]t must

> be interpreted in the light of the common law, the principles and history of which were familiarly known to the framers of the constitution. . . .
>
> In *Minor v. Happersett*, Chief Justice Waite, when construing, in behalf of the court, the very provision of the fourteenth amendment now in question, said: "The constitution does not, in words, say who shall be natural-born citizens. Resort must be had elsewhere to ascertain that." And he proceeded to resort to the common law as an aid in the construction of this provision.

(Citations omitted.) 169 U.S. at 654-55.

In *Wong Kim Ark*, the Court then traced the United States' reliance on the common law rule of citizenship by birth from its origins in *Calvin's Case*. 77 Eng. Rep. 377, 399 (Exch. Ch. 1608). That case established that a person's status as a natural-born subject[4] requires that (1) the person's birth occur within the bounds of the King's *dominion* and (2) that the parents owe obedience to the King at the time of the child's birth. *Id.* at 655. Further, in *Wong Kim Ark* the Court stated:

> The fundamental principle of the common law with regard to English nationality was birth within the allegiance—also called "ligealty," "obedience," "faith," or "power"—of the king. *The principle embraced all persons born within the king's allegiance, and subject to his protection.*

Id. (Emphasis added.) Continuing its analysis, the Court noted:

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[4]"The term 'citizen,' as understood in our law, is precisely analogous to the term 'subject' in the common law, and the change of phrase has entirely resulted from the change of government." *Wong Kim Ark*, 169 U.S. at 664.

> Mr. Dicey, in his careful and thoughtful Digest of the Law of England with Reference to the Conflict of Laws, published in 1896, states the following propositions . . . . " 'Natural-born British subject' means a British subject who has become a British subject at the moment of birth. Subject to the exceptions hereinafter mentioned, any person who (whatever the nationality of his parents) is born within the British dominions is a natural-born British subject. This rule contains the leading principle of English law on the subject . . . ."

Id. at 657.[5]

The Court in *Wong Kim Ark* then noted that the above quoted rule was adopted by the English Colonies and was implicitly incorporated by the framers into the original Constitution: "The same rule was in force in all the English colonies upon this continent down to the time of the Declaration of Independence, and in the United States afterwards, and continued to prevail under the constitution as originally established." 169 U.S. at 658.

> "Before our Revolution, all free persons born *within the dominions* of the king of Great Britain, whatever their color or complexion, were native-born British subjects; those born out of his allegiance were aliens. . . . The sovereignty has been transferred from one man to the collective body of the people; and he

[5]The noted exceptions were: "(1) Any person who (his father being an alien enemy) is born in a part of the British dominions, which at the time of such person's birth is in hostile occupation, is an alien. (2) Any person whose father (being an alien) is at the time of such person's birth an ambassador or other diplomatic agent accredited to the crown by the sovereign of a foreign state is (though born within the British dominions) an alien." *Id.* at 657-58. The reason for these exceptions is that a person born under either of these circumstance does not owe allegiance to the sovereign nation in whose territory that person is born.

> who before was a 'subject of the king' is now a 'citizen of the state.' " [Quoting *State v. Manual*, (1838) 4 Dev. & B. 20, 26.]
>
> That all children, born *within the dominion* of the United States, of foreign parents holding no diplomatic office, became citizens at the time of their birth, does not appear to have been contested or doubted . . . .

Id. at 664-65 (emphasis added).

Following an extensive review of the cases and commentaries focusing on the definition of citizenship spanning three centuries,[6] the Court in *Wong Kim Ark* stated: "There is, therefore, little ground for the theory that at the time of the adoption of the fourteenth amendment of the constitution of the United States there was any settled and definite rule . . . inconsistent with the ancient rule of citizenship by birth *within the dominion*." *Id.* at 667 (emphasis added). In sum, the Court stated that it was "irresistibly" led to conclude that the Citizenship Clause "affirms the ancient and fundamental rule of citizenship by birth *within the territory*, in the allegiance and under the protection of the country . . . ." 169 U.S. at 693 (emphasis added).[7]

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[6]*Wong Kim Ark* also cites the *Commentaries* of Chancello. Kent, 2 Kent, Comm. (6th Ed.) 39, 258, wherein Chancellor Kent stated: "And if, at common law, all human beings born within the ligeance of the king, and under the king's obedience, were natural-born subjects, and not aliens, I do not perceive why this doctrine does not apply to these United States in all cases in which there is no express constitutional or statute declaration to the contrary." *Wong Kim Ark* at 665.

[7]The Court's conclusion accords with the understanding expressed by Congressman Broomall of Pennsylvania, with respect to the nearly identical language adopted as part of the Civil Rights Act of 1866, Rev. Stat. § 1992, ch. 31, 14 Stat. 27 (1866):

> The first provision of the bill declares that all persons born in the United States, and not subject to any foreign Power, are citi-

Finally, the Court applied this established common law view to the passage of the Fourteenth Amendment and concluded that:

> In the forefront, both of the fourteenth amendment of the constitution, and of the civil rights act of 1866, the fundamental principle of citizenship by birth within the *dominion* was reaffirmed in the most explicit and comprehensive terms. . . .
>
> As appears upon the face of the amendment, as well as from the history of the times, this was not intended to impose any new restrictions upon citizenship, or to prevent any persons from becoming citizens . . . who would thereby have become citizens according to the law existing before its adoption.

Id. at 675-76 (emphasis added).

Writing in a pre-Fourteenth Amendment case,[8] *Inglis v.*

> zens of the United States. As a positive enactment, this would hardly seem necessary. Even as a declaration of existing law, a proposition that at most can only be said to embrace the true meaning of the word "citizen" would seem to find its more appropriate place in the elementary treatises upon law rather than upon the statute books.

Cong. Globe, 39th Congress, 1st Sess. 1262 (1866) (Congressman Broomall). *See also* 4 C. Gordon and S. Mailman, *supra* note 3, §§ 92.03[1][a], [b]:

> The ancient and indisputable citizenship rule of the British common law was the *jus soli*, under which a person's nationality is determined by the place of his birth. . . . It is clear, of course, that the American colonies and the nation they ultimately established had accepted the precepts of the English common law, as part of the heritage from the mother country.

[8] *See also Gardner v. Ward*, 2 Mass. 244 (1805). The Supreme Judicial Court of Massachusetts, Mr. Justice (afterwards Chief Justice) Sewall, held that the determination of whether a man was a citizen or an alien was

Sailor's Snug Harbor, 3 Pet. 99 (1830), Justice Thompson in his majority opinion states: "It is universally admitted both in English courts *and in those of our own country*, that all persons born within the colonies of North America, while subject to the crown of Great Britain, were natural-born British subjects . . . ." *Id.* at 120 (emphasis added). Justice Story, in his concurrence,[9] elaborates on this proposition further:

> Two things usually concur to create citizenship [by birth]: first, *birth locally within the dominions of the sovereign*; and, second, birth within the protection and obedience, or in other words, within the ligeance of the sovereign. That is, the party must be born within a place where the sovereign is at the time in full possession and exercise of his power, and the party must also at his birth derive protection from, and, consequently, owe obedience or allegiance to, the sovereign . . . .

Inglis v. Sailors' Snug Harbor, 3 Pet. 99, 155 (1830) (Story, J., concurring) (emphasis added).

I provide such extensive detail and quotations from *Wong Kim Ark* and *Inglis* because the majority opinion dismisses out of hand any language from these case as nondispositive dicta, and states that the dissent selects "ambiguous" phrases

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"to be governed altogether by the principles of the common law," and "that a man, born within the jurisdiction of the common law, is a citizen of the country wherein he is born. By this circumstance of his birth, he is subjected to the duty of allegiance which is claimed and enforced by the sovereign of his native land; and becomes reciprocally entitled to the protection of that sovereign, and to the other rights and advantages which are included in the term 'citizenship.' "

[9]The majority complains that this citation comes from the dissent in *Inglis*. Justice Story dissented from a *different* section of *Inglis*. All of the Justices in *Inglis* agreed on the question at issue in the quoted section. *See, Wong Kim Ark*, 169 U.S. at 659.

and uses them in a "misleading" manner out of context. *See supra* majority opinion at 11403-11405. Contrary to this contention, the terms "territory," "dominion," and "sovereignty" appear dozens of times throughout *Wong Kim Ark* and *Inglis* when interpreting the right to citizenship under the Fourteenth Amendment. These decisions make clear the importance of the common law's interpretation of citizenship as applied under the Fourteenth Amendment, and the determination that citizenship must extend to all persons owing allegiance within the *territory or dominion* of the sovereign nation.

Thus, a careful reading of *Wong Kim Ark* and *Inglis* points to two conclusions. First, the term "in the United States," as used in the Citizenship Clause, means "within the dominion or territory of the United States." Second, the majority opinion directly contradicts the intention of the authors of the Fourteenth Amendment and frustrates the purpose of that amendment, by restricting the definition of natural-born citizen to those persons born in the states of the Union.

The majority's interpretation is also directly at odds with the Supreme Court's decision in the *Slaughter House Cases*, 16 Wall. 36, (1873), in which the Court examined the meaning and intention of the Citizenship Clause in light of the events that led to its ratification. *Id.* at 71. According to the Supreme Court, one of the main reasons the Citizenship Clause was adopted was to "put[ ] to rest" the notion that "those . . . who had been born and resided always in the District of Columbia or in the territories, though within the United States, were not citizens." *Id.* at 72. The Citizenship Clause was adopted after the Civil War precisely to codify the common law and put control of citizenship by birth beyond the power of the legislature and the courts. The Fourteenth Amendment "declares that persons may be citizens of the United States *without regard to their citizenship of a particular state* and it overturns the *Dred Scott* decision by making all persons born within the United States and subject to its

jurisdiction citizens of the United States." *Id.* at 73 (emphasis added).

B. United States' Dominion and Control

Applying what I believe is proper construction of the Citizenship Clause to the present case, the crucial question is whether between 1898 and 1946 the Philippine Islands were part of the United States' "dominion." Webster's New International Dictionary defines "dominion" as:

> That which is subject to sovereignty or control; specif.; . . . Territory governed, or over which authority is exercised; the tract, district, or country, considered as subject; as, the *dominions* of a king.

Webster's New International Dictionary of the English Language 769 (2d ed. 1940).[10]

The majority opinion does not argue that the Philippines were not within the "dominion" of the United States during the territorial period. Our government's conduct toward the Philippines during this period, as well as judicial decisions concerning the Philippines, confirm the obvious: that between December 10, 1989 and July 4, 1946, the Philippines were subject to the *complete sovereignty* of the United States and therefore were within the *dominion* of our nation.

Congressional enactments during the territorial period

[10]The definition of "dominion" contained in the Oxford English Dictionary is substantially the same:

> The territory owned by or subject to a king or ruler, or under a particular government or control. Esp. a country outside England or Great Britain under the sovereignty of or owing allegiance to the English or British crown; *spec. † (a) pl.* the English possessions in America; . . . .

IV Oxford English Dictionary 949 (2d ed. 1989).

made clear that the United States both maintained and exercised sovereignty over the Philippines during the territorial period. For example, Congress created a tripartite system of government in the Philippines, apparently modeled on our own.[11] However, Congress reserved ultimate control over these institutions to the United States, and the United States exercised this control except as to relatively insubstantial matters.

The United States, for example, retained and exercised substantial control over the Philippine executive branch. In 1916, Congress created the office of the Governor General, and vested the office with "supreme executive power." *See* § 21, 39 Stat. at 552. Congress authorized the President of the United States ("the President") to appoint the Governor General, and to "modify or vacate the action" of the Governor General. § 21, 39 Stat. at 552. The Governor General, in turn, was empowered to control all executive departments, to command the Philippine military, and to veto acts of the Philippine legislature. § 21, 39 Stat. at 552.

Congress reserved and exercised substantial control over the Philippine legislature, as well. Congress required the Philippine legislature to report to Congress all laws enacted by that legislature, and Congress reserved to itself and the President the power to annul those laws. § 19, 39 Stat. at 551; § 2(a)(11), 48 Stat. at 457; § 7(2), 48 Stat. at 461. Furthermore, statutes covering certain subjects could not take effect without the President's affirmative approval.[12] All enactments of the Philippine legislature were required to contain a clause that provided: "By authority of the United States be it enacted

[11] *See* Philippine Government Act, ch. 1369, 32 Stat. 691 (1902); Philippine Autonomy Act, ch. 416, 39 Stat. 545 (1916); Philippine Independence Act, ch. 84, 48 Stat. 456 (1934).

[12] *See*, § 13, 32 Stat. at 695-96 (disposition of land); § 10, 39 Stat. at 548 (tariffs, immigration, currency); § 2(a)(9), 48 Stat. at 457 (currency & coinage, imports & exports, and immigration).

by the Philippine Commission . . . . " § 1, 32 Stat. at 692. Moreover, the President appointed the members of the first Philippine legislative body. § 1, 32 Stat. at 691. Even after Congress permitted Filipinos to elect their own legislators, it restricted eligibility for legislative positions to those "owing allegiance to the United States." § 7, 32 Stat. at 694.

Our government also exercised extensive control over the Philippine judiciary. Congress created a judicial system, including a supreme court of the Philippines, § 9, 32 Stat. at 695, and the President was charged with appointing the chief and associate justices of that court, with the advice and consent of the Senate. § 9, 32 Stat. at 695; § 26, 39 Stat. at 555.[13] Furthermore, decisions of the supreme court of the Philippines were, with minor exceptions, reviewable by the Supreme Court of the United States. § 10, 32 Stat. at 695; § 27, 39 Stat. at 555; § 7(6), 48 Stat. at 462.

Even after Congress in 1934 provided for the creation of a constitutional government in the Philippines, it retained substantial ultimate control over the Philippine "Commonwealth."[14] Congress prescribed in fair detail the provisions of the Philippine constitution,[15] which was required to provide that all citi-

[13]Judges of the courts "of first instance" (trial courts) were appointed by the civil governor (and later by the Governor General) of the Philippines, by and with the advice and consent of the Philippine Commission. § 9, 32 Stat. at 695; § 26, 39 Stat. at 555. (However, the President appointed the civil governor, Governor General, and members of the Philippine Commission. § 1, 32 Stat. at 691; § 21, 39 Stat. at 552-53.)

[14]*See* Philippine Independence Act, ch. 84, 48 Stat. 456 (1934).

[15]Those provisions included (1) recognition of the United States' right to intervene in the governance of the Philippines, § 2(a)(14), 48 Stat. at 457; (2) recognition of the United States' right to expropriate Philippine lands and command the Philippine armed forces, § 2(a)(12), 48 Stat. at 457; (3) continuing review by the United States Supreme Court of decisions by the courts of the Philippines, § 2(a)(13), 48 Stat. at 457; and (4) continuing reports of all acts passed by the legislature to be reported to Congress, § 2(a)(11), 48 Stat. at 457.

zens of the Philippine Islands *owed allegiance to the United States*, and that every officer of the Philippine Commonwealth, before taking office, declare that "he recognizes and accepts the supreme authority of and will maintain true faith and allegiance to the United States." §§ 2(a)(1) & (2), 48 Stat. at 456.

Even during this period of increasing autonomy, Congress reserved enormous powers to the United States. For example, the President was authorized to veto any amendment to the Philippine constitution, § 7(1), 48 Stat. at 460-61, and retained the power to suspend the effect of any law, contract, or executive order of the Philippine Commonwealth. § 7(2), 48 Stat. at 461. The Philippine Islands' foreign affairs continued to be subject to the United States' "direct supervision and control." § 2(a)(10), 48 Stat. at 457.

In addition to this statutory record of United States sovereignty over the Philippines, numerous decisions have expressly recognized that after Spain ceded the Philippines to this country, those islands became part of the United States' dominion. For example, in *Fourteen Diamond Rings v. United States*, 183 U.S. 176 (1901), the Supreme Court observed that upon Spain's cession of the Philippine Islands to the United States, those islands

> came under the *complete and absolute sovereignty and dominion of the United States*, and so became *territory of the United States* over which civil government could be established. The result was the same although there was no stipulation that the native inhabitants should be incorporated into the body politic, and none securing to them the right to choose their nationality. *Their allegiance became due to the United States*, and they became entitled to its protection.

183 U.S. at 179 (emphasis added). Even after Congress created the Philippine "Commonwealth" in 1934, the Supreme

Court confirmed that the Philippine Islands continued to form part of the United States' "dominion":

> [I]t is contended that the passage of the Philippine Independence Act of March 24, 1934, and the adoption and approval of a constitution for the Commonwealth of the Philippine Islands have created a different situation; . . . . Undoubtedly, these acts have brought about a profound change in the status of the islands and in their relations to the United States; but the sovereignty of the United States has not been, and, for a long time, may not be finally withdrawn. So far as the United States is concerned, the Philippine Islands are not yet foreign territory.

Cincinnati Soap Co. v. United States, 301 U.S. 308, 319 (1937) (citation omitted). To the same effect is *Barber v. Gonzales*, 347 U.S. 637 (1954):

> From the Spanish cession in 1898 until final independence in 1946, the Philippine Islands were American territory subject to the jurisdiction of the United States. [ ] Persons born in the Philippines during this period were . . . entitled to the protection of the United States and conversely owing permanent allegiance to the United States.

347 U.S. at 639 n.1 (citation omitted).

In sum, these statutes and decisions demonstrate that the United States maintained and exercised sovereignty and control over the Philippine Islands and its inhabitants during the territorial period, and that the Philippine Islands were "within the dominion of the United States" during the territorial period.[18]

[18]*See also* Joseph R. Hayden, *The Philippines: a Study in National Development*, (New York: Macmillan Co., 1942). Hayden was vice-governor of the Philippine Islands from 1933 to 1935. In his work on the

Not surprisingly, some scholars writing around the time of our acquisition of the Philippines recognized precisely this outcome. *See, e.g.*, Simeon E. Baldwin, *The Constitutional Questions Incident to the Acquisition and Government by the United States of Island Territory*, 12 Harv. L. Rev. 393, 406 (1899) ("the XIV Amendment would seem to make every child, of whatever race, born in any of our new territorial possessions [Guam, Puerto Rico, and the Philippines] after they become part of the United States, of parents who are among its inhabitants and subject to our jurisdiction, a citizen from the moment of birth.").

Thus, I conclude that the Philippine Islands were sufficiently under the dominion and control of the United States such that persons born in the Philippines between December 10, 1898 and July 4, 1946 were born "in the United States" within the meaning of the Citizenship Clause.

C. The Insular Cases

The majority opinion does not offer an alternate viewpoint of the common law or the history and purpose of the Fourteenth Amendment. Instead, the majority opinion contends that an inquiry into the development of the Fourteenth Amendment is unnecessary, because the Supreme Court determined unequivocally the meaning of the phrase "the United States" as used throughout the Constitution after it wrote its decision in *Wong Kim Ark*. The majority opinion bases this determination on the doubtful authority of one of a series of Supreme Court decisions referred to as the *Insular*

Philippines during the Commonwealth period, he observes that the Philippine Commonwealth was "more completely subject to ultimate Congressional control than an incorporated territory, like Alaska." *Id.* at 763. He also notes that the extent of the United States control over the Philippine Commonwealth far exceeded the control maintained by Britain over the members of British Commonwealth of Nations, which were considered British "dominions." *Id.*

Cases. See, e.g., Balzac v. Porto Rico, 258 U.S. 298 (1922); *Dorr v. United States*, 195 U.S. 138 (1904); and *Downes v. Bidwell*, 182 U.S. 244 (1901); *see also Examining Bd. of Engineers, Architects & Surveyors v. Flores de Otero*, 426 U.S. 572, 600 n.30 (1976).

According to the *Insular Cases*, under the judicially-created doctrine of "territorial incorporation," the guarantees provided by the Constitution automatically apply in full force only to "incorporated" territories, i.e., those that Congress designates as destined for statehood.[17] *Flores de Otero*, 426 U.S. at 600 n.30. The only exception to this doctrine recognized in the *Insular Cases* is that certain " 'fundamental' constitutional rights" do apply even to inhabitants of "unincorporated territories," i.e., those territories not so designated by Congress as destined for statehood.[18] *Id.*

In the present case, the majority hangs its hat on an isolated reference to the Fourteenth Amendment from a lengthy fifty-seven page opinion in just one of the *Insular Cases*, i.e., *Downes v. Bidwell*, 182 U.S. 244 (1900). In *Downes*, the Court was called on to interpret the Revenue Clause of Arti-

[17]The majority opinion disavows any reliance on the doctrine of territorial incorporation in its footnote 8 where it states: "We note that the territorial scope of the phrase "the United States" is a distinct inquiry from whether a constitutional provision should extend to a territory . . . and we rely on the *Insular Cases* only to determine the meaning of the phrase "in the United States." This statement does not seem to make sense. The meaning of "in the United States" is not before us as an abstract concept. The issue before us is whether the Citizenship Clause extends to a territory. By disavowing but in effect adopting the reasoning of the *Insular Cases*, the majority opinion holds that Congress may deny citizenship to persons born in the Philippines because the Citizenship Clause only applies to a territory if it has been "incorporated" by statehood. Thus, the majority opinion does in fact rely on the doctrine of territorial incorporation in construing the Citizenship Clause of the Fourteenth Amendment.

[18]In *Dorr*, the Supreme Court held that the Philippine Islands were such an "unincorporated territory." 195 U.S. at 143 (Congress has "refrained from incorporating the Philippines into the United States").

cle I, Section 8 of the Constitution. Specifically, the Court considered "whether the *revenue clauses* of the Constitution extend of their own force to our newly acquired territories" such as Puerto Rico. 182 U.S. at 249 (emphasis added). In so doing, Justice Brown stated that "[t]he Constitution itself does not answer the question. Its solution must be found in the nature of the government created by that instrument . . . in the practical construction put upon it by Congress, and in the decisions of this court." *Id.* Relying heavily on the particular history of the Revenue Clause, the Court determined that, based on the doctrine of "territorial incorporation," the Revenue Clause does not apply to unincorporated territories.

Downes only interpreted the Revenue Clause. Yet, the majority opinion, without considering whether citizenship is a fundamental right, decides that the Fourteenth Amendment Citizenship Clause does not apply to unincorporated territories such as the Philippines. This determination is based on a brief and isolated reference in *Downes* to the Thirteenth and Fourteenth Amendments. Regarding the Thirteenth Amendment, the Court in *Downes* notes that it applies on its face not only to the United States, but to any place within the United States' jurisdiction ("within the United States, or in any place subject to their jurisdiction"). *Id.* at 251. The Court, in two sentences, then contrasts the Thirteenth and Fourteenth Amendments.

> Upon the other hand, the 14th Amendment, upon the subject of citizenship, declares only that "all persons born or naturalized *in the United States*, and subject to the jurisdiction thereof, are citizens of the United States and of the *state* wherein they reside." Here there is a limitation to persons born or naturalized in the United States, which is not extended to persons born in any place "subject to their jurisdiction."

Id. (Emphasis in original.) Based on these brief references in *Downes* to the Thirteenth and Fourteenth Amendments, the

majority opinion concludes that the Fourteenth Amendment Citizenship Clause applies only to the states of the Union, not to unincorporated territories such as the Philippines.

The majority opinion's conclusion is incorrect for two reasons. First, the majority opinion's reliance on language in *Downes* which discusses the Thirteenth and Fourteenth Amendments is misplaced because *Downes* fails to address the dispositive issue now before this Court. The dispositive issue is: what does the phrase "*in* the United States" mean in the context of the Fourteenth Amendment. The dispositive issue in *not* whether the Fourteenth Amendment applies to persons born outside of the United States but otherwise subject to its jurisdiction. In short, regarding the Fourteenth Amendment, *Downes* only restates that a person must be born *in the United States*. *Downes* does not define for Fourteenth Amendment purposes what "*in* the United States" means.

Second, the majority opinion's interpretation of the Citizenship Clause overlooks the very advice given at the outset of *Downes* by Justice Brown. His advice directs us to look to the "nature of government created by" the Constitution, as well as "the decisions of this court." *Downes*, 182 U.S. at 249. In the present case, this can only by done by examining the history and common law behind the *Citizenship Clause*, not by looking to historical information concerning an entirely different provision —the *Revenue Clause*. Thus, by contravening the guidance provided in *Downes*, the majority opinion mistakenly resorts to the history of the Revenue Clause to determine the meaning and territorial scope of the Citizenship Clause.

Moreover, it is important to remember that the *Insular Cases* are a product of their time, a time when even the Supreme Court based its decisions, in part, on fears of other races. *See, e.g., Downes*, 122 U.S. at 282 (racial differences are among the difficulties Congress must face in annexing distant territories). Justice Harlan warns in his vigorous dis-

sent in *Downes* that the principles announced in that case could work "a radical and mischievous change in our system of government." *Downes*, 122 U.S. at 380 (Harlan J., dissenting). "The idea," Justice Harlan wrote, "that this country may acquire territories anywhere upon the earth, by conquest or treaty, and hold them as mere colonies or provinces—the people inhabiting them to enjoy only such rights as Congress chooses to accord them—is wholly inconsistent with the spirit and genius, as well as with the words, of the Constitution." *Id.*

The Supreme Court has explicitly directed us not to expand the holdings or reasoning of the *Insular Cases*. In *Reid v. Covert*, the Supreme Court stated:

> The *Insular Cases* can be distinguished from the present case in that they involved the power of Congress to provide rules and regulations to govern temporarily territories with wholly dissimilar traditions and institutions wherein as here the *basis for governmental power is American citizenship*. . . . Moreover, it is our judgment that neither the cases nor their reasoning should be given any further expansion. The concept that the Bill of Rights and other constitutional protections against arbitrary government are inoperative when they become inconvenient or when expediency dictates otherwise is a very dangerous doctrine and if allowed to flourish would destroy the benefit of a written Constitution and undermine the basis of our government.

354 U.S. 1, 14 (1957) (plurality opinion) (footnotes omitted).[19]

[19] *See also Harris v. Rosario*, 446 U.S. 651, 653 (1980) (Marshall, J., dissenting) ("the present validity of those decisions [in the *Insular Cases*] is questionable"); *Torres v. Puerto Rico*, 442 U.S. 465, 475-76 (1979) (Brennan, J., concurring) (questioning the "validity of the old cases such as *Downes v. Bidwell*, *Dorr v. United States*, and *Balzac v. Porto Rico*") (citations omitted); and *Flores de Otero*, 426 U.S. at 600 n. 31 (stating that *Reid v. Covert*, 354 U.S. 1 (1957) overruled the *Insular Cases*).

Thus, it is problematic for the majority opinion to rely *solely* on the *Insular Cases* to determine domestic constitutional rights other than those specifically addressed by those cases. I emphasize that neither *Downes* nor any of the other *Insular Cases* purport to address the territorial scope of the Citizenship Clause. As explained above, the history and purpose of the Fourteenth Amendment should be viewed from the perspective explicated at length in *Wong Kim Ark*, a case which focuses on the meaning of citizenship.

In sum, the majority opinion is the first to apply the doctrine of "territorial incorporation" as expressed in *Downes* and the other *Insular Cases* to determine the meaning of "the United States" as used elsewhere in the Constitution. Sadly, the majority opinion is the first to deny the benefits of the Citizenship Clause to persons born in a United States territory.

D. Citizenship as a Fundamental Right

Finally, even if the reasoning of the *Insular Cases* were applicable to the present case, I believe that the majority erred in *not* finding that the right to citizenship by birth is among those "fundamental constitutional rights [that] apply by their own force," according to the *Insular Cases*, throughout the dominion of the United States. *Flores de Otero*, 426 U.S. at 600 n.30.

In *Dorr*, the Court explained that certain constitutional provisions would apply of their own force even in the unincorporated territories:

> Doubtless Congress, in legislating for the territories, would be subject to those fundamental limitations in favor of personal rights which are formulated in the Constitution and its amendments; but these limitations would exist by inference and the general spirit of the Constitution from which Congress derives all

> its powers, than by any express and direct application of its provisions.

Dorr, 195 U.S. at 146 (quoting *Church of Jesus Christ of Latter Day Saints v. United States*, 136 U.S. 1, 44 (1890)).

The majority opinion, when it concludes that birth in the Philippines does not give rise to citizenship under the Fourteenth Amendment, ignores the requirement to determine whether citizenship is a "fundamental right." *See supra* majority opinion at 11402, fn.8. As discussed above, the *Insular Cases* hold that fundamental constitutional rights cannot be abridged in the United States territories. There is no dispute that the Philippines were a United States territory. Therefore, under the *Insular Cases* a court *must* decide if citizenship is a fundamental right *as well as* deciding whether citizenship is guaranteed under the Fourteenth Amendment to persons born in the Philippines.

Among those fundamental constitutional protections that the Supreme Court has held or otherwise indicated apply of their own force to unincorporated territories are those embodied in the First Amendment Free Speech Clause, the Fourth Amendment, the Due Process Clause, and the Equal Protection Clause. *See Harris*, 446 U.S. at 653 (listing cases); *Torres*, 442 U.S. at 469-70 (same). The only constitutionally protected individual rights that the Supreme Court has found inapplicable to unincorporated territories are the rights to trial by jury and to a grand jury indictment. *See Dorr*, 195 U.S. at 149 (no right to trial by jury in the Philippines); *Balzac*, 258 U.S. at 311 (no right to trial by jury in Puerto Rico).

The Fourteenth Amendment guarantee of citizenship to those born "in the United States" is precisely the type of "fundamental" restriction on government conduct that would apply of its own force under the *Insular Cases*. First, the rule of citizenship by birth in the territory of the sovereign predated not only its codification in our Constitution, but the

birth of this nation itself. *See Wong Kim Ark*, 169 U.S. at 658. Thus, the right to citizenship by birth in the territory, even before it was "expressed in so many words in the Constitution," *Dorr*, 195 U.S. at 147, was a right respected at common law in this country, in England, and indeed through much of Europe. *See Wong Kim Ark*, 169 U.S. at 666 ("the rule in Europe generally . . . [was that] 'mere birth within the realm gives the rights of a native-born citizen.' ").

It is difficult to conceive of a right more fundamental, or more jealously guarded, than the right of citizenship by birth affirmed in the Citizenship Clause. Fourteenth Amendment citizenship cannot be revoked for any reason without the consent of the citizen. *See Afroyim*, 387 U.S. at 267-68 ("Citizenship is no light trifle to be jeopardized any moment Congress decides to do so under the name of one of its general or implied grants of power. . . . Our holding does no more than [recognize each citizen's] constitutional right to remain a citizen in a free country unless he voluntarily relinquishes that citizenship.").

In contrast to the absolute nature of Fourteenth Amendment citizenship, other constitutional rights, such as those protected by the First Amendment, may be abridged if the government can demonstrate their restriction is necessary to further a compelling state interest. *See, e.g., Burson v. Freeman*, 112 S. Ct. 1846, 1851 (1992). Because First Amendment rights are among those fundamental limitations on government that apply of their own force, *see Torres*, 442 U.S. at 469, certainly the more absolute right of citizenship by birth must also apply of its own force.

Furthermore, our right to citizenship by birth outweighs even our right to life. For example, even when Congress could impose capital punishment for wartime desertion, it could not revoke United States citizenship as punishment for that same crime. *See Trop v. Dulles*, 356 U.S. 86, 99-102 (1958) (death

penalty is still widely accepted punishment, but expatriation "is a form of punishment more primitive than torture").

Thus, the majority opinion's application of the doctrine of territorial incorporation to the present case, without also considering whether citizenship is a fundamental right, incorrectly applies the law of the *Insular Cases* on which the majority opinion so heavily relies. And, the majority opinion's application of the doctrine of territorial incorporation abrogates Plaintiffs' fundamental right to United States citizenship by virtue of their birth in a territory of the United States—the Philippines.

CONCLUSION

A review of relevant authorities ineluctably leads me to conclude that the District Court erred in dismissing Plaintiffs' complaints for failure to state a claim, and that the majority opinion erroneously affirms that dismissal. Persons born in the Philippines during the territorial period indisputably were born within the dominion of the United States, and therefore were born "in the United States" within the meaning of the Citizenship Clause. Moreover, neither congressional power to control naturalization and regulate territories, nor the now disfavored doctrine of territorial incorporation, authorizes this Court to deny to these Plaintiffs what the people of this country sought to ensure under the Fourteenth Amendment—the inviolability of the fundamental right to citizenship by birth.

APPENDIX B

DENIAL OF PETITION FOR REHEARING BY NINTH CIRCUIT COURT OF APPEALS

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

NOV -8 1994

FOR THE NINTH CIRCUIT

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

RODOLFO RABANG; JOSE TION GUILLO; LEONORA VER SANIDAD; ALFREDO MAGLINAO; JOSEPHINE YCARO; MICHAEL YCARO; JOHN YCARO,	NO. 91-16125
	D.C Nos. CV 90-00154 HMF; 90-00161 HMF; 90-00162 HMF; 90-00171 HMF; 90-00176 HMF
Plaintiffs-Appellants,	
vs.	ORDER
IMMIGRATION AND NATURALIZATION SERVICE,	
Defendant-Appellee.	

Before: TANG, PREGERSON, and ALCARON, Circuit Judges.

The members of the panel (Judges Tang, Pregerson and Alarcon) have voted as follows: Judges Alarcon and Tang vote to deny the petition for rehearing and

recommend rejection of en banc suggestion. Judge votes to grant rehearing and votes to grant the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX C

DECISION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

RODOLFO RABANG, REY RAMON RABANG RONY RABANG, ELSA RABANG TAGALICUD, and JOHNNY RABANG, Plaintiffs, vs. IMMIGRATION & NATURALIZATION SERVICE, Defendant.	Civil No. 90-00154 HMF
JOSE TION GUILLO, Plaintiff, vs. IMMIGRATION & NATURALIZATION SERVICE, Defendant.	Civil No. 90-00161 HMF
LEONORA SANIDAD, Plaintiff, vs. IMMIGRATION & NATURALIZATION SERVICE, Defendant.	Civil No. 90-00162 HMF
ALFREDO MAGLINAO, Plaintiff, vs.	Civil No. 90-00171 HMF

FILED IN THE
UNITED STATES
DISTRICT COURT,
DISTRICT OF HAWAII

JUN 05 1991
at 9 o'clock and 15
.min, A.M
WALTER A.Y.H. CHINN,
CLERK

IMMIGRATION & NATURALIZATION SERVICE, Defendant.	
JOSEPHINE YCARO, MICHAEL YCARO, and JOHN YCARO, Plaintiffs, vs. IMMIGRATION & NATURALIZATION SERVICE, Defendant.	Civil No. 90-00176 HMF

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

INTRODUCTION

On May 6, 1991, the court held a hearing on five consolidated cases for which the defendant Immigration and Naturalization Service (INS) brought a motion to dismiss, or, in the alternative, for summary judgment. Ronald T. Oldenburg appeared on behalf of the plaintiffs and Kendall Warren appeared on behalf of the defendant. The defendant filed its motion

on February 21, 1991 and the plaintiffs filed a memorandum in opposition on April 26, 1991.

BACKGROUND

The Plaintiffs in this action are various people who have two things in common: first, they were all born in the Philippines between the dates of the Treaty of Paris (1899) or have parents who were so born, thus conferring upon them the status of the United States "national" for that period; and, second, they are all currently involved in various stages of deportation proceedings instituted by the INS. However, these plaintiffs also allege another common factor: they allege that they are all citizens of the United States by virtue of their birth in the Philippines (or derivative from the birth of their parents) and as such are being denied rights of United States citizenship by the INS proceedings.

DISCUSSION

I. Applicable Law

Rule 12(b) of the Federal Rules of Civil Procedure provides as follows:

> Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto, except that the following defenses may at the option of the pleader be made by motion: (6) failure to state a claim upon which relief can be granted....

In considering a 12(b)(6) motion to dismiss, the general rule is that a complaint should not be dismissed on the pleadings "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 102 (1957); Gillespie v. Civiletti, 629 F. 2d 637 (9th Cir. 1980); California ex. rel. Younger v. Mead, 618 F. 2d 618, 620 (9th Cir. 1980).

In evaluating a complaint, any doubts should by construed in favor of the pleader. Ernest W. Hahn, Inc. v. Codding, 615 F. 2d 830, 834-36 (9th Cir. 1980). The complaint must be liberally construed, giving the plaintiff, the benefit of all proper inferences. Scheuer v. Rhodes, 416

U.S. 232, 236, 94 S. Ct. 1683, 1686 (1974).

The court looks to the complaint to ascertain the nature of plaintiff's claims. However, where matters external to the pleadings are introduced and are not excluded by the court, a Rule 12(b)(6) motion should be treated as a motion for summary judgement pursuant to Fed. R. Civ. P. 56. Rosales v. United States, 824 F. 2d 799, 802 (9th Cir. 1987).[1]

II. Status of the Philippines and its People

Both the plaintiffs and the defendant cite the court to a lengthy history of the

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[1]The defendant brings an alternative motion for summary judgment which is supported by an affidavit and INS decisions regarding the plaintiffs. The defendant additionally argues that the case cannot be heard at this time because all administrative remedies have not been exhausted (appeals are still pending within the INS). The plaintiffs argue that such administrative remedies would be a "useless exercise" because the INS has no authority to rule on the constitutionality of statutes, Matter of L, 4 I&N Dec. 556 (1951), and also because INS precedent holds that people born in the Philippines are not United States citizens at birth, Matter of Hermosa, 14 I&N Dec. 447 (BIA 1973). The court will not rule on these issues because it grants the defendant's motion for dismissal.

United States' involvement in the Philippines and to the fact that people born in the Philippines between the dates of the Treaty of Paris and the independence of the Philippines were declared by Congreess to be United States nationals. See Article IX of the Treaty of Paris, ratified on April 11, 1989, 30 Stat. 1754, 1759; Philippine Independence Act of 1934, P.L. 73-127, 48 Stat. 456; and section 204 (a) of the Nationality Act of 1940, 54 Stat. 1137 (1940).

The plaintiffs additionally recite to the court the history of the political origins and racism in the United States. The plaintiffs then draw inferences between the automatic exclusion of Filipinos from United States citizenship and the past abhorrent treatment of slaves and Native Americans in this country. To this end, the plaintiffs cite modern historical accounts of United States-Philippines interaction and conclude that the United States did not actually intend to guide the Philippines to independence, but instead intended to control the country and include it as part of the United States. See S. Karnow, In Our

Image, America's Empire in the Philippines (1989).

Both parties cite the court to cases declaring that people born in the Philippines between 1899 and 1946 are nationals and that as nationals are not citizens of the United States. See Cabebe v. Acheson, 183 F. 2d 795 (9th Cir. 1950), Matter of Hermosa, 14 I&N Dec. 447 (BIA 1973). The plaintiffs, however, urge this court to consider the racist context of the initial decisions upholding Congress' right to legislate citizenship matters[2] upon which later decisions rely. Plaintiffs ask the court to declare that they are indeed citizens of the United States under the Fourteenth Amendment to the Constitution.

The Fourteenth Amendment declares that "All persons born...in the United States, and subject to the jurisdiction thereof, are citizens of the United States...." The plaintiffs claim that the Philippines, for the relevant period in question, was not only subject to the jurisdiction of the United States but was

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[2]The plaintiffs are referring to the Insular Cases, the key case being Downes v. Bidwell, 182 U.S. 244 (1901).

also a part of the United States, and because of that fact its people are citizens of the United States under the language of the Fourteenth Amendment.

While the issue presented by the plaintiffs in this action is an extremely interesting one, it is much more subject to appellate review and change at the Supreme Court level. Both sides agree that the law is clear on the status of people born in the Philippines at all times relevant herein; the plaintiffs, however, seek to alter decades of interpretation of law and history because of modern understandings of historical events.

This court will not be the one to rewrite the law on the citizenship status of people born in the Philippines and their children. Therefore, the court grants the defendant's motion and dismisses these actions for failure to state a claim upon which relief may be granted; this decision is based upon the fact that the rights of citizenship cannot be taken away where one was never a citizen in the first place.

Accordingly, the court GRANTS the defendant's motion to dismiss.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, June 05, 1991

/s/ Harold M. Fong
UNITED STATES DISTRICT JUDGE

RODOLFO RABANG, REY RAMON RABANG, RONY RABANG TAGALICUD, and JOHNNY RABANG v. IMMIGRATION & NATURALIZATION SERVICE
Civil No. 90-00154 HMF
JOSE TION GUILLO v. IMMIGRATION & NATURALIZATION SERVICE
Civil No. 90-00161 HMF
LEONORA SANIDAD v. IMMIGRATION & NATURALIZATION SERVICE
Civil No. 90-00162 HMF
ALFREDO MAGLINAO v. IMMIGRATION & NATURALIZATION SERVICE
Civil No. 90-00171 HMF
JOSEPHINE YCARO, MICHAEL YCARO, and JOHN YCARO v. IMMIGRATION & NATURALIZATION SERVICE
Civil No. 90-00176 HMF
ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

APPENDIX D

TREATY OF PEACE BETWEEN THE UNITED STATES OF AMERICA AND THE KINGDOM OF SPAIN signed December 10, 1898

(Note: The original document is in both English and Spanish. The Spanish version has been omitted in the following.)

TREATY OF PEACE Between the United States of America and the Kingdom of Spain. Signed at Paris, December 10, 1898; rectification advised by the Senate, February 6, 1899; ratified by the President, February 6, 1889; ratified by her Majesty the Queen Regent of Spain, March 19, 1889; ratifications exchanged at Washington, April 11, 1899; proclaimed, Washington, April 11, 1899.

BY THE PRESIDENT
OF THE UNITED STATES OF AMERICA.

A PROCLAMATION.

Whereas, a Treaty of Peace between the United States of America and Her Majesty the Queen Regent of Spain, in the name of her August Son, Don Alfonso XIII, was concluded and signed by their

respective plenipotentiaries at Paris on the tenth day of December, 1898, the original of which Convention being in the English and Spanish languages, is word for word as follows:

THE UNITED STATES OF AMERICA AND HER MAJESTY THE QUEEN REGENT OF SPAIN, IN THE NAME OF HER AUGUST SON DON ALFONSO XIII, desiring to end the state of war now existing between the two countries, have for that purpose appointed as Plenipotentiaries:

THE PRESIDENT OF THE UNITED STATES,

WILLIAM R. DAY, CUSHMAN K. DAVIS, WILLIAM P. FRYE, GEORGE GRAY, and WHITELAW REID, citizens of the United States;

AND HER MAJESTY THE QUEEN REGENT OF SPAIN,

DON EUGENIO MONTERO RIOS, President of the Senate,

DON BUENAVENTURA DE ABARZUZA, Senator of the Kingdom and ex-Minister of the Crown,

DON JOSE DE GARNICA, Deputy to the Cortes and Associates Justice of the Supreme Court;

DON WENCESLAO REAMIREZ DE VILLA-URRUTIA, Envoy Extraordinary and Minister Plenipotentiary at Brussels, and

DON RAFAEL CERRO, General of Division;

Who, having assembled in Paris, and having exchanged their full powers, which were found to be in due and proper form, have after discussion of the matters before them, agreed upon the following articles:

ARTICLE I

Spain relinquishes all claim of sovereignty over and title to Cuba.

And as the island is, upon its evacuation by Spain, to be occupied by the United States, the United States will, so long as such occupation shall last, assume and discharge the obligations that may under international law result from the fact of its occupation, for the protection of life and property.

ARTICLE II

Spain cedes to the United States the island of Porto Rico and other islands now under Spanish sovereignty in the West Indies, and the island of Guam in the Marianas or Ladrones.

ARTICLE III

Spain cedes to the United States the archipelago known as the Philippine

Islands, and comprehending the islands lying within the following line:

A line running from west to east along or near the twentieth parallel of north latitude, and through the middle of the navigable channel of Bachi, from the one hundred and eighteenth (118th) to the one hundred and twenty seventh (127th) degree meridian of longitude east of Greenwich, to the parallel of four degrees and forty five minutes (4° 45') north latitude, thence along the parallel of four degrees and forty five minutes (4° 45') north latitude to its intersection with the meridian of longitude one hundred and nineteen degrees and thirty five minutes (119° 35') east of Greenwich, thence along the meridian of longitude one hundred and nineteen degrees and thirty five minutes (119° 35') east of Greenwich to the parallel of latitude seven degrees

and forty minutes (7° 40') north to its intersection with the one hundred and sixteenth (116th) degree meridian of longitude east of Greenwich, thence by a direct line to the intersection of the tenth (10th) degree parallel of north latitude with the one hundred and eighteenth (118th) degree meridian of longitude east of Greenwich, and thence along the one hundred and eighteenth (118th) degree meridian of the longitude east of Greenwich to the point of beginning.

The United states will pay to Spain the sum money of twenty million dollars ($20,000,000) within three months after the exchange of the ratifications of the present treaty.

ARTICLE IV

The United States will, for the term of ten years from the date of exchange of the ratifications of the present treaty, admit Spanish ships and merchandise to the ports of the Philippine Islands on the same terms as ships and merchandise of the United States.

ARTICLE V

The United States will, upon the signature of the present treaty, send back to Spain, at its own cost, the Spanish soldiers taken as prisoners of war on the capture of Manila by the American forces. The arms of the soldiers in question shall be restored to them.

Spain will, upon the exchange of the ratifications of the present treaty, proceed to evacuate the Philippines, as well as the island of Guam, on terms

similar to those agreed upon by the Commissioners appointed to arrange for the evacuation of Porto Rico and other islands in the West Indies, under the Protocol of August, 12, 1898, which is to continue in force till its provisions are completely executed.

The time within which the evacuation of the Philippine Islands and Guam shall be completed shall be fixed by the two Governments. Stands of colors, uncaptured war vessels, small arms, guns of all calibres, with their carriages and accessories, powder, ammunition, live stock, and materials and supplies of all kinds, belonging to the land and naval forces of Spain in the Philippines and Guam, remain the property of Spain. Pieces of heavy ordnance, exclusive of field artillery, in the fortifications and coast defences, shall remain in their

emplacements for the term of six months. to be reckoned from the exchange of ratifications of the treaty; and the United States may, in the mean time. purchase such material from Spain. if a satisfactory agreement between the two Governments on the subject shall be reached.

ARTICLE VI

Spain will, upon the signature of the present treaty, release all prisoners of war, and all persons detained or imprisoned for political offences, in connection with the insurrections in Cuba and the Philippines and the war with the United States.

Reciprocally, the United States will release all persons made prisoners of war by the American forces, and will undertake to obtain the release of all Spanish

prisoners in the hands of the insurgents in Cuba, and the Philippines.

The Government of the United States will at its own cost return to Spain and the Government of Spain will at its own cost return to the United States, Cuba, Porto Rico, and the Philippines, according to the situation of their respective homes, prisoners released or caused to be released by them, respectively, under this article.

ARTICLE VII.

The United States and Spain mutually relinquish all claims for indemnity, national and individual, of every kind, of either Government, or of its citizens or subjects, against the other Government, that may have arisen since the beginning of the late insurrection in Cuba and prior to the exchange of ratifications of the

present treaty, including all claims for indemnity for the cost of the war.

The United States will adjudicate and settle the claims of its citizens against Spain relinquished in this article.

ARTICLE VIII.

In conformity with the provisions of Articles I, II, and III of this treaty, Spain relinquishes in Cuba, and cedes in Porto Rico and other islands of the West Indies, in the island of Guam, and in the Philippine Archipelago, all the buildings, wharves, barracks, forts, structures, public highways and other immovable property which, in conformity with the law, belong to the public domain, and as such belong to the Crown of Spain.

And it is hereby declared that the relinquishment of cession, as the case may be, to which the preceding paragraph

refers, cannot in any respect impair the property or rights which by law belong to the peaceful possession of property of all kinds, of provinces, municipalities, public or private establishments, ecclesiastical or civic bodies, or any other associations having legal capacity to acquire and possess property in the aforesaid territories renounced or ceded, or of private individuals, of whatsoever nationality such individuals may be.

The aforesaid relinquishment or cession, as the case may be, includes all the documents exclusively referring to the sovereignty relinquished or ceded that may exist in the archives of the Peninsula. Where any documents in such archives only in part relates to said sovereignty, a copy of such part will be furnished whenever it shall be requested. Like rules shall be reciprocally observed in

favor of Spain in respect of documents in the archive of the islands above referred to.

In the aforesaid relinquishment or cession, as the case may be, are also included such rights as the Crown of Spain and its authorities possess in respect of the official archives and records, executive as well as judicial, in the islands above referred to, which relate to said islands or the rights and property of their inhabitants. Such archives and records shall be carefully preserved, and private persons shall without distinction have the right to require, in accordance with law, authenticated copies of the contracts, wills and other instruments forming part of notarial protocols or files, or which may be contained in the executive or judicial archives, be the

latter in Spain or in the islands aforesaid.

ARTICLE IX.

Spanish subjects, natives of the Peninsula, residing in the territory over which Spain by the present treaty relinquishes or cedes her sovereignty, may remain in such territory or may remove therefrom, retaining in either event all their rights of property, including the right to sell or dispose of such property or of its proceeds; and they shall also have the right to carry on their industry commerce and professions, being subject in respect thereof to such laws as are applicable to other foreigners. In case they remain in the territory they may preserve their allegiance to the Crown of Spain by making, before a court of record, within a year from the date of the

exchange of ratifications of this treaty, a declaration of their decision to preserve such allegiance; in default of which declaration they shall be held to have renounced it and to have adopted the nationality of the territory in which they may reside.

The civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by the Congress.

ARTICLE X.

The inhabitants of the territories over which Spain relinquishes or cedes her sovereignty shall be secured in the free exercise of their religion.

ARTICLE XI.

The Spaniards residing in the territories over which Spain by this treaty cedes or relinquishes her sovereignty shall be subject in matters civil as well as criminal to the jurisdiction of the courts of the country wherein they reside, pursuant to the ordinary laws governing the same; and they shall have the right to appear before such courts, and to pursue the same course as citizens of the country to which the courts belong.

ARTICLE XII.

Judicial proceedings pending at the time of the exchange of ratifications of this treaty in the territories over which Spain relinquishes or cedes her sovereignty shall be determined according to the following rules:

1. Judgments rendered either in civil suits between private individuals, or in criminal matters, before the date mentioned, and with respect to which there is no recourse or right of review under the Spanish law, shall be deemed to be final, and shall be executed in due form by competent authority in the territory within which such judgments should be carried out.

2. Civil suits between private individuals which may on the date mentioned be undetermined shall be prosecuted to judgment before the court in which they may then be pending or in the court that may be substituted therefor.

3. Criminal actions pending on the date mentioned before the Supreme Court of Spain against citizens of the territory which by this treaty ceases to be Spanish shall continue under its jurisdiction

until final judgment; but, such judgment having been rendered, the execution thereof shall be committed to the competent authority of the place in which the case arose.

ARTICLE XIII.

The rights of property secured by copyrights and patents acquired by Spaniards in the Island of Cuba, and in Porto Rico, the Philippines and other ceded territories, at the time of the exchange of the ratifications of this treaty, shall continue to be respected. Spanish scientific, literary and artistic works, not subversive of public order in the territories in question, shall continue to be admitted free of duty into such territories, for the period of ten years, to be reckoned from the date of the

exchange of the ratifications of this treaty.

ARTICLE XIV.

Spain shall have the power to establish consular officers in the ports and places of the territories, the sovereignty over which has been either relinquished or ceded by the present treaty.

ARTICLE XV.

The Government of each country will, for the term of ten years, accord to the merchant vessels of the other country the same treatment in respect of all port charges, including entrance and clearance dues, light dues, and tonnage duties, as it accords to its own merchant vessels, not engaged in the coastwise trade.

This article may at any time be terminated on six months' notice given by either government to the other.

ARTICLE XVI.

It is understood that any obligations assumed in this treaty by the United States with respect to Cuba are limited to the time of its occupancy thereof; but it will upon the termination of such occupancy, advise any Government established in the island to assume the same obligations.

ARTICLE XVII.

The present treaty shall be ratified by the President of the United States, by and with the advice of the consent of the Senate thereof, and by Her Majesty the Queen Regent of Spain; and the ratifications shall be exchanged at

Washington within six months from the date hereof, or earlier if possible.

In faith whereof, we, the respective Plenipotentiaries, have signed this treaty and have hereunto affixed our seals.

Done in duplicate at Paris, the tenth day of December, in the year of Our Lord one thousand eight hundred and ninety eight.

[SEAL] WILLIAM R. DAY
[SEAL] CUSHMAN K. DAVIS
[SEAL] WM P FRYE
[SEAL] GEO. GRAY
[SEAL] WHITELAW REID.
[SEAL] EUGENIO MONTERO RIOS
[SEAL] B. DE ABARAZUZA
[SEAL] J. DE GARNICA
[SEAL] W R DE VILLA URRUTIA
[SEAL] RAFAEL CERERO

And whereas, the said Convention has been duly ratified on both parts, and the ratifications of the two Governments were exchanged in the City of Washington, on

the eleventh day of April, one thousand eight hundred and ninety-nine;

Now, therefore, be it known that I, William McKinley, President of the United States of America, have caused the said Convention to be made public, to the end that the same and every article and clause thereof may be observed and fulfilled with good faith by the United States and the citizens thereof.

In witness whereof, I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the City of Washington, this eleventh day of April, in the year of Our Lord one thousand eight hundred and ninety-nine, and of the Independence of the United States the one hundred and twenty-third.

[SEAL] WILLIAM McKINLEY

By the President:

JOHN HAY

Secretary of State.

(2)

No. 94-1544

SUPREME COURT, U.S.
FILED
MAY 17 1995
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1994

LEONORA SANIDAD, ET AL., PETITIONERS

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

DREW S. DAYS, III
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QUESTIONS PRESENTED

1. Whether petitioners are citizens of the United States by virtue of their birth in the Philippine Islands at a time when they constituted a territory of the United States.

2. Whether Congress had the authority to classify citizens of the Philippine Islands as "nationals" but not citizens of the United States.

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In the Supreme Court of the United States

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IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 31-68) is reported at 35 F.3d 1449. The opinion of the district court (Pet. App. 73-81) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 20, 1994. A petition for rehearing was denied on November 8, 1994. Pet. App. 71. The petition for a writ of certiorari was filed on February 6, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. At the close of the Spanish-American War on December 10, 1898, Spain ceded to the United States the Philippine Islands, Puerto Rico and Guam. See Treaty of Peace, Dec. 10, 1898, U.S.-Spain, arts. II, III, 30 Stat. 1755 (Treaty of Paris). Article IX of the Treaty provided that the inhabitants of the Philippines could remain subjects of Spain by making their intention to do so known within one year of the Treaty. 30 Stat. 1759. Otherwise, they were deemed "to have adopted the nationality of the territory in which they * * * reside[d]." *Ibid.* The Treaty declared that "[t]he civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by Congress." *Ibid.*; see *Rabang* v. *Boyd*, 353 U.S. 427, 429 (1957). The Senate passed a virtually contemporaneous resolution that "by the ratification of the treaty of peace with Spain it is not intended to incorporate the inhabitants of the Philippine Islands into citizenship of the United States, nor is it intended to permanently annex said islands as an integral part of the territory of the United States." 32 Cong. Rec. 1846 (1899).

In 1902, after a period of military rule, Congress enacted the Philippine Government Act, ch. 1369, 32 Stat. 691. That Act provided, in pertinent part, that "inhabitants of the Philippine Islands" and their "children born subsequent" to April 11, 1899, were deemed "citizens of the Philippine Islands and as such [were] entitled to the protection of the United States." § 4, 32 Stat. 692. During that period, citizens of the Philippine Islands were commonly known as

"nationals" of the United States. Pet. App. 38 n.5; *Rabang* v. *Boyd*, 353 U.S. at 429-432.

In 1934, Congress adopted the Philippine Independence Act, ch. 84, 48 Stat. 456 (Independence Act), which provided for complete withdrawal of United States sovereignty ten years after the adoption of a Philippine constitution. § 10(a), 48 Stat. 463. The Independence Act also declared that for immigration purposes the Philippine Islands were to be "considered to be a foreign country" and its citizens were to be treated "as if they were aliens." § 8(a)(4) and (1), 48 Stat. 462. On July 4, 1946, the United States relinquished control over the Philippine Islands and declared them to be an independent sovereign, thus triggering a provision of the Independence Act that "the immigration laws of the United States * * * shall apply to persons who were born in the Philippine Islands to the same extent as in the case of other foreign countries." § 14, 48 Stat. 464; see *Rabang* v. *Boyd*, 353 U.S. at 429-430.

2. Petitioners, individuals born in the Philippines during the period of United States' control (or whose parents were born there during that period), brought declaratory judgment actions in the United States District Court for the District of Hawaii claiming that they are United States citizens by virtue of the Citizenship Clause in Section 1 of the Fourteenth Amendment. Pet. App. 37.[1] They argued that at the time that they (or their parents) were born, the Philippines were "in the United States" and thus that

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[1] The Citizenship Clause provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.

they are constitutionally entitled to citizenship. *Ibid.* The district court dismissed petitioners' claims on the merits, stating that it was not willing "to rewrite the law on the citizenship status of people born in the Philippines and their children." Pet. App. 80.

3. The court of appeals affirmed. Pet. App. 31-68. The court held that petitioners' (or their parents') births in the Philippines during the period of the United States' control was not sufficient to qualify them for citizenship under the Citizenship Clause of the Fourteenth Amendment *Id.* at 38-40. The court noted that this Court, in *Downes* v. *Bidwell*, 182 U.S. 244 (1901), and its companion cases,[2] decided that the territorial scope of "the United States" as used in the Constitution is limited to the States of the Union and that it thus "does not include all territories subject to the jurisdiction of the United States government." Pet. App. 40. Judge Pregerson dissented. *Id.* at 43-68.

ARGUMENT

The court of appeals correctly held that persons born in the Philippines were not born "in the United States," and therefore did not acquire citizenship at birth under the Fourteenth Amendment. That ruling does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

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[2] *Downes* was one of a series of cases (collectively referred to as the *Insular Cases*) involving constitutional questions about newly acquired island territories. See also *De Lima* v. *Bidwell*, 182 U.S. 1 (1901); *Dooley* v. *United States*, 182 U.S. 222 (1901); *Armstrong* v. *United States*, 182 U.S. 243 (1901); *Hawaii* v. *Mankichi*, 190 U.S. 197 (1903); *Dorr* v. *United States*, 195 U.S. 138 (1904).

This Court recently denied a petition for a writ of certiorari in *Summerfield* v. *INS*, 115 S. Ct. 1427 (1995) (No. 94-1208), a case presenting identical legal claims that was consolidated with petitioners' case for argument in the court of appeals and was decided on the same day by that court. In light of the recent denial of review in *Summerfield*, the Court should also deny the petition in the instant case.

1. Petitioners' first contention (Pet. 21-22) is that they are United States citizens by operation of the Citizenship Clause of the Fourteenth Amendment, § 1, Cl. 1, which provides: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

As we explained in greater detail in our brief in opposition in *Summerfield*,[3] this Court has consistently rejected a reading of the term "United States" as used in the Constitution to include overseas territories that were acquired for a limited duration. See, *e.g.*, *Downes* v. *Bidwell*, 182 U.S. 244, 287 (1901) (opinion of Brown, J.); *id.* at 342 (White, J., concurring in the judgment); *Hooven & Allison Co.* v. *Evatt*, 324 U.S. 652, 673, 674 (1945) (Philippines "are territories belonging to, but not a part of, the Union of states under the Constitution," and for that reason imports "brought from the Philippines into the United States * * * are brought from territory, which is not a part of the United States, into the territory of the United States"); *Rabang* v. *Boyd*, 353 U.S. at 432 ("This Court has held that 'the power to acquire territory by treaty implies not only the

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[3] We have furnished counsel for petitioners with a copy of our brief in opposition in *Summerfield*.

power to govern such territory, but to prescribe upon what terms the United States will receive its inhabitants, and what their *status* shall be.'"); *id.* at 432 n.12 ("The inhabitants of the islands acquired by the United States during the late war with Spain, *not being citizens of the United States*, do not possess the right of free entry in the United States.") (emphasis added). Because the Philippines were never "in the United States," petitioners' citizenship was not governed by the Citizenship Clause, and petitioners were not citizens by birth. See *Rogers* v. *Bellei*, 401 U.S. 815, 827 (1971).[4]

2. Petitioners also err in contending (Pet. 22-26) that the United States was without authority to classify citizens of the Philippines as "nationals" but not citizens of the United States. The United States' power to define the status of inhabitants of the Philippines derived from three sources. Congress had authority under the Constitution to "make all needful Rules and Regulations respecting the Territory * * * belonging to the United States," Art. IV, § 3, Cl. 2, and "[t]o establish an uniform Rule of Naturalization," Art. I, § 8, Cl. 4. In addition, because the formal transfer of the Philippines to the United States was achieved through the Treaty of Paris, the United States' authority derived as well from Article II, § 2, Cl. 2 (the President "shall have Power, by and with the Advice and Consent of the Senate, to make

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[4] Petitioners suggest (Pet. 26-27) that the decision in *Downes* v. *Bidwell* was tainted by racial bias. This Court, however, has continued to rely on *Downes* v. *Bidwell* and the other *Insular Cases* in determining the constitutional rights of individuals outside the United States. See, *e.g.*, *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 268-269 (1990).

Treaties, provided two thirds of the Senators present concur"), as augmented by the Necessary and Proper Clause, Art. I, § 8, Cl. 18. These fonts of constitutional authority were sufficient to permit Congress to legislate with regard to a category of persons subject to, and protected by, the sovereignty of the United States, without making them citizens. Cf. *Kleindienst* v. *Mandel*, 408 U.S. 753, 765-766 (1972).[5]

The history of the Louisiana Territory referred to by petitioners (Pet. 22) provides a clear contrast. The treaty conveying that territory to the United States provided that "[t]he inhabitants of the ceded territory shall be incorporated in the Union of the United States, and admitted as soon as possible * * * to the enjoyment of all the rights, advantages and immunities of citizens of the United States." Treaty of Apr. 30, 1803, U.S.-France, art. III, 8 Stat. 202. That language manifested an intent to incorporate the territory into the Union and expressly contemplated United States citizenship for its inhabitants. See *United States* v. *Percheman*, 32 U.S. (7 Pet.) 51, 68 (1833); *American Ins. Co.* v. *356 Bales of Cotton*, 26 U.S. (1 Pet.) 511, 542 (1828). In contrast, the Treaty of Paris and contemporaneous congressional actions evidenced an intent *not* to vest

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[5] Article IX of the Treaty of Paris provided that the inhabitants of the Philippines would adopt the "nationality of the territory in which they may reside" and that "[t]he civil rights and political status of the native inhabitants * * * shall be determined by the Congress." 30 Stat. 1759. Petitioners suggest (Pet. 24-25) that "political status" does not include citizenship status, but the equivalence of these terms is well established. See, *e.g.*, *Hidemitsu Toyota* v. *United States*, 268 U.S. 402, 411 (1925); *Balzac* v. *Porto Rico*, 258 U.S. 298, 302 n.1 (1922); *In re Heff*, 197 U.S. 488, 503 (1905).

citizens of the Philippines with United States citizenship or to admit the Philippines into the Union as a State. See *Balzac* v. *Porto Rico*, 258 U.S. 298, 308 (1922); *Fourteen Diamond Rings* v. *United States*, 183 U.S. 176, 179-180 (1901).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Attorneys

MAY 1995